85-600

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

IN RE:
BECKNELL & CRACE COAL CO., INC., BANKRUPT

LOLA GAY SLOAN, TONY SLOAN, LOLA BETTYE SLOAN, NED T. SLOAN, JIMMIE SLOAN, JOHN SLOAN, MARGARET SLOAN and BRUCE R. SLOAN - - Petitioners

versus

RUBEN G. HICKS, TRUSTEE IN BANKRUPTCY OF BECKNELL & CRACE COAL COMPANY, INC., BANKRUPT - - Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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October 7, 1985

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116 pgs

QUESTIONS PRESENTED FOR REVIEW

I. Whether the decision of the United States Court of Appeals for the Sixth Circuit, granting a Trustee in Bankruptcy an unlimited time to assume or reject an Executory Contract, (contrary to the expressed statutory limitations of sixty (60) days), conflicts with the decisions of this Court, decisions of all the Federal Courts, by ignoring, and thus extending or amending, the express limitation of 11 USC § 110b, Bankruptcy Rules 607 and 906, now codified as 11 USC 365(d)(1)?

II. Whether the Sixth Circuit decision, granting a fee simple interest in Kentucky land to the Trustee, under a terminable and defeasible Executory Contract, violates the requirements of 28 USC 1652 and conflicts with the decisions of this Court, other Federal Courts, and the law of Kentucky defining and governing a fee simple interest in land?

III. By awarding the Trustee a greater title than the Bankrupt had and by granting him such title without requiring the performance of its burdens and conditions, has the Sixth Circuit decision conflicted with and exceeded the permissible limits established by this Court and all other Federal Courts?

IV. Is the lower court decision a denial of the freedom of contract, by rewriting the contract contrary to its terms, and by denying the rights of termination, a deprivation of liberty and property rights in violation of the Fifth Amendment of the Constitution of the United States?

V. Whether the decision of the Sixth Circuit is so patently illogical, incompatible, and incomplete on its face that it departs so far from the usual and accepted course

of judicial proceedings as to require the exercise of this Court's power of supervision?

The parties are those listed in the caption, with the exception of Lola Gay Sloan, who died in June, 1983, while this matter was pending before the U. S. District Court for the Eastern District of Kentucky. Pursuant to FRCP 25(A)(2) an order was entered by the District Court permitting this action to proceed in the name of the remaining Petitioners who are sons and daughters-in-law of the deceased, and her only heirs. The Bankrupt, Becknell & Crace Coal Co., Inc., has not been a party since the adjudication in Bankruptcy under Chapter 7 on September 15, 1972. John Sloan, a retired attorney, who has not maintained his bar membership, has represented himself since 1976.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. _____

IN RE:
BECKNELL & CRACE COAL CO., INC.

LOLA GAY SLOAN, ET AL. - - - *Petitioners*

v.

RUBEN G. HICKS, TRUSTEE - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, hereafter referred to as Sloans, respectfully pray that a Writ of Certiorari issue to review a decision of the United States Court of Appeals for the Sixth Court because of the failure of said Court to follow mandatory provisions of the Bankruptcy Statutes, the denial of undisputed contract rights upheld by the Courts in Bankruptcy matters and, such departure by the Court from the accepted and usual course of judicial proceedings as to call for the exercise of this Courts' supervision.

OPINIONS BELOW

1. The decision of the United States Court of Appeals for the Sixth Circuit of May 8, 1985, is reported at 761 F. 2d 319 and reprinted in Appendix pp. 1a-6a hereto.

2. The judgment, opinion and order of United States District Court for the Eastern District of Kentucky rendered March 25, 1982, is not reported and is printed in the Appendix pp. 9a-20a.

3. The memorandum opinion and judgment of the Bankruptcy Court for the Eastern District of Kentucky rendered July 19, 1976, is not reported and is printed in the Appendix pp. 21a-35a.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was rendered on May 8th, 1985. A timely petition for rehearing, en banc, was denied by order of the Court of Appeals on July 11, 1985, (Appendix p. 37a). This Petition for Certiorari was filed within ninety (90) days of the order denying the petition for rehearing.

This Court's jurisdiction is invoked by petitioners pursuant to 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS

1. Article 1, Section 1 of the Constitution of the United States.

2. Article 1, Section 8, Clause 4, of the Constitution of the United States.

3. Fifth Amendment of the Constitution of the United States.

STATUTES AND RULES INVOLVED

11 USC § 110(b) (Pre Code);
Bankruptcy Rules 607 and 906 (Pre Code);
28 USC 1652;
11 USC 365(d)(1) (New Bankruptcy Code).

The above constitutional and statutory provisions, and rules are set out verbatim in Appendix p. 61a hereto.

STATMENT OF CASE

This case concerns a Lease-Purchase Contract for mining and removal of coal underlying 3,000 acres of Kentucky land entered into on January 22nd, 1970, between the Petitioners, hereafter referred to as Sloans, and Becknell & Crace Coal Co., Inc., hereafter referred to as Bankrupt. Because the terms of the contract control the rights of the parties thereto, the entire contract, and one supplement thereto, are set out verbatim (Appendix pp. 38a-56a).

Because the statutory time limit requiring automatic rejection of an Executory Contract, expressed in 11 USC 110(b), Bankruptcy Rules 607 and 906 go to the very heart of this matter and because the Sixth Circuit opinion omitted the procedural dates after the initial filing,[1] the date of each important procedural step is set out hereinbelow.

After mining for about two years and paying about ¼ of the required royalty, mining ceased and the con-

[1]All procedural dates were before the Sixth Circuit Court of Appeals in Appendix, record, briefs and arguments.

tracts became in default. Thereafter, on May 18th, 1972, Becknell & Crace filed a Petition under Chapter 11 listing the Sloan contract as a Lease and Executory Contract (Appendix p. 66a). On August 21st, 1972, no steps having been taken by the debtor-in-possession to either assume, reject or perform the contract, Sloans filed a petition to direct rejection as required by 11 USC § 753 (Pre Code). On September 15th, 1972, an order was entered adjudging the debtor bankrupt under Chapter 7. Ruben G. Hicks was appointed as Trustee on October 12, 1972.

On November 3rd, 1972, Mr. Hicks filed an answer to the Sloans' Petition to Reject claiming:

> "the instrument dated January 22nd, 1970, and signed by the Petitioners conveyed to the Bankrupt a fee simple title to the within described property subject to a lien reserved for payment on the balance of the purchase price."

The Petition to Reject and the Trustees' Answer are found in Appendix pp. 67a-71a.

On the same day, November 3rd, 1972, Trustee filed an "Application to Extend Time Within which Trustee shall Assume or Reject Executory Contract." The Bankruptcy Court *made no ruling on this application within the sixty (60) statutory period, nor at any time thereafter,* other than to say it was moot. The Trustee never thereafter mined any coal, paid any royalties, or performed any other provision of the contract. Instead, all assets of the Bankrupt including all mining machinery and tools were sold by the Trustee or returned to secured creditors. (Emphasis added).

Relying on the mandatory provisions of the statute and rules, (that the contract was rejected by statutory mandate), and relying on the terms of contract which they had declared terminated in their Petition to Reject, Sloans closed all roads leading into their property and denied access to it to anyone. By order entered March 12, 1974, Trustee was permitted to enter the property for the "purpose of observing and measuring."

At an evidentiary hearing on June 13th, 1973, the Bankruptcy Court ruled that the Trustee had the burden of proving that he had title, as he claimed, to the property. His only witness, Dr. Becknell, admitted and filed the contracts in evidence, and admitted that the contracts were only p rtially performed (Appendix pp. 58a-60a). He introduced no proof as to any conveyance of title, recording of deed, recording of lease, or any other evidence of title other than the contract set out in the Appendix.

Since the Trustee had proved and filed the contract, and since he proved that the contract had been only ¼ performed by Becknell and since he failed to show performance of any necessary mining or other conditions required to obtain title to the remaining coal as stated in the contract after removal of three million tons, and, since the contract was clearly executory, and listed in the sworn schedules as such, and since the mandatory rejection period had passed, there was nothing further to prove under the pleadings in this case, therefore, the Sloans called no witnesses. In

other words, the only proof of any performance of this contract and its terms was that of the Trustee.

In July, 1976, the Bankruptcy Court decided that the Trustee had a fee simple title to the coal underlying the Sloans' land; that the contract was not executory; and that Trustee's application for extension of time to assume or reject was moot. (Appendix pp. 34a-35a).

Appropriate and timely motions were made and proper appeal was taken to the United States District Court for the Eastern District of Kentucky. On March 25, 1982, the District Court affirmed the Bankruptcy Court. Again, timely motions were made and proper appeal was taken to the United States Court of Appeals for the Sixth Circuit. The opinions and orders of the lower courts are set out in Appendix hereto.

REASONS FOR GRANTING THE WRIT

Argument 1

By granting the Trustee in Bankruptcy an unlimited time to assume or reject an Executory Contract, the decision of the Court of Appeals is contrary to, and violates the express mandatory statutory limitation of sixty (60) days thus changing or amending the explicit automatic rejection rule established by the statute (now codified as 11 U.S.C. 365(d)(1)) and, in doing so, conflicts with the decisions of this Court and other decisions of the Sixth Circuit and other Federal Courts.

A. STATUTORY AND RULE PROVISIONS.

The pertinent portion of 11 USC 110(b) reads:

> The Trustee *shall assume or reject an Executory Contract,* including an unexpired lease of real property *within sixty (60) days* after the adjudica-

tion or within thirty (30) days after the qualification of the Trustee, whichever is later, but the Court may, for cause shown, extend or reduce the time. *Any such contract or lease not assumed or rejected within that time shall be deemed rejected.* (Reprinted in full Appendix p. 62a).

Pertinent Sections of Bankruptcy Rules 607 and 906 (Reprinted in full in Appendix pp. 64a-65a) are:

Rule 607.

". . . Any such contract not assumed within sixty (60) days after qualification of the Trustee or within such further or reduced time as the Court may allow within such sixty-day period shall be deemed to be rejected."

Rule 906.

". . .; But it (referring to the Court) may not extend the time for taking any action under Rules —— 607 ——, except to the extent and under the conditions stated therein.

11 USC 365(d)(1) (New Bankruptcy Code set out in full in Appendix p. 63a) restates the same mandatory provisions in part as follows:

"In a case under Chapter 7 of this title, if the Trustee does not assume or reject an Executory Contract . . . of the debtor within sixty (60) days after the order for relief, or within such additional time as the Court, for cause, within such sixty (60) day period, fixes, then such contract or lease is deemed rejected."

Trustee qualified on October 12th, 1972. He moved for an extension of time on November 3rd, 1972. He

took no action to obtain a ruling on his motion. He requested no hearing thereon, and he gave no notice to be heard.

The time limit fixed by statute and rule expired on December 12, 1972.

The Court of Appeals held that the Trustee should have been given the opportunity to accept or reject. But, he had the same opportunity to assume or reject, or get an extension of time, as is given to every Trustee in Bankruptcy. He knew of the limitations as proven by his application for extension during the period. He was then, and still is, represented by extremely capable counsel.

B. THE SIXTH CIRCUIT WAS BOUND TO FOLLOW THE STATUTES AND RULES AS WRITTEN AND COULD NOT EXTEND OR ALTER THE STATUTORY PERIOD.

This case does not present any question as to the constitutionality of any portion of the Bankruptcy Act or the new Bankruptcy Code.

Instead, this case presents what is perhaps a rarity, insistence that the statutes be followed, particularly, where the statute, in clear, plain, unambiguous terms requires mandatory rejection, leaving no discretion to the Court as to time limits, and even going so far as to limit the time when the Court could make an extension of time.

Article 1, Section 1 of the Constitution of the United States reads:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which

> shall consist of a Senate and House of Representatives."

Article 1, Section 8, Clause 4 states that the Congress shall have the power to establish:

> "uniform laws on the subject of Bankruptcies throughout the United States."

Accordingly, since legislative powers were not given to the Courts, the Court of Appeals was bound to follow the statute as written, and hold that the Trustee had no further interest after automatic rejection of the contract at bar.

By its decision in this case, the Sixth Circuit has decreed that the Trustee, after twelve and one-half (12½) years of inaction, must now be given an opportunity to assume or reject an Executory Contract. We believe that this decision, to the extent that it changes the explicit terms of the statutes, is legislation on the part of the Court.

In *Stanard* v. *Olesen,* (1954) 370 U.S. 498 and *FTC* v. *Jantzen,* (1967) 386 U. S. 228, this Court stated: "Legislature has the power to decide what policy of law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed."

Again, in *Mobile Oil Corp.* v. *Higginbotham,* (1978) 436 U. S. 618, the Court held that it had no authority to substitute its views for those expressed by Congress in a duly enacted statute. In *United States* v. *Rutherford,* (1979) 442 U. S. 544, we find this language:

> "When construing a statute so explicit in scope, a Court must act within certain well defined con-

> straints. If a legislative purpose is expressed in 'plain and unambiguous language', . . . the . . . duty of the Courts is to give it effect according to its terms."

Many such decisions can be found, both of this Court and of all the Federal Courts, in the various West Federal Practice Digests, Constitutional Law, Key No. 70.1, et seq., to the effect that, where the Congress or Legislature has expressed, in a valid constitutional statute, clear and definite terms, the Courts must follow those statutory mandates and cannot substitute the Court's judgment therefor.

This is precisely the error committed by the Sixth Circuit in the instant decision. It has completely emasculated the time limitation provision, and automatic rejection resulting therefrom, expressed so clearly in 11 USC 110(b) and continued under the new code. The enactment of the same provision in the new code should have demonstrated completely the intent of Congress. The Court of Appeals was bound to follow these requirements.

Argument 2

The decision of the Sixth Circuit granting a fee simple interest in Kentucky land to the Trustee under a terminable and defeasible Executory Contract violates the requirements of 28 U.S.C. 1652 and conflicts with the decisions of this Court, other Federal Courts, and the law of Kentucky which defines a fee simple interest in Kentucky land.

A. DEFINITION OF FEE SIMPLE INTEREST IN KENTUCKY.

Two cases decided by Kentucky's highest Court, and which cases are followed to this day: *Slayden* v.

Hardin, 257 Ky. 685, 79 S. W. 2d 11 (1935) and *Van Camp* v. *Evans,* 306 Ky. 59, 206 S. W. 2d 38, are decisive.

Both of these cases define a fee simple interest in Kentucky land as:

> "In the acquisition of a fee simple title to land, one gets an estate unlimited as to duration, disposition, and descendibility. It must be an estate that may last forever; it must have no termination. It must be one the recipient may dispose of as he chooses by will, deed or otherwise. It must be descendible not to some of his heirs, but to any and all heirs the recipient may happen to have."

The Van Camp case, supra, involved a lease which required certain activities on the part of the lessee in exploring and producing. It was contended that the lease conveyed a fee simple interest so that the widow of the lessee had a dower interest therein. The Van Camp Court stated further

> "This provision is contrary to the concept of a fee simple estate. A fee simple is absolute, complete and self-sufficient. An estate which must be nourished or kept alive by the grantee is obviously conditional, or qualified, or limited. This element of insecurity, implicit in the grant, impairs the totality and permanency of the estate. It is not, then, a fee simple."

In the case at bar, the contract provides that both the lessor and the lessee can terminate the contract, the lessor for default in any term or condition, and the lessee for any reason. The contract further provides

that a fee simple title will be granted *only* to *coal* under the surface *remaining after the lessee has mined three million tons and paid therefor.*

Certainly, the Court of Appeals' decision is contrary to the decided Kentucky law as to fee simple title.

B. THE COURT OF APPEALS WAS REQUIRED TO FOLLOW THE ABOVE KENTUCKY LAW PURSUANT TO 28 U.S.C. § 1652 AND THE MANY CASES DECIDED THEREUNDER BY THIS COURT AND OTHER FEDERAL COURTS.

28 USC 1652 is also couched in mandatory language. It reads, verbatim:

> "The laws of the several states, except where the Constitution or Treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

A great many cases under this Section are annotated under the "notes of decisions" following 28 USCA 1652 covering approximately 500 pages of annotations. Practically all of them require the Federal Courts to follow the State Court's decision in matters involving state contracts and state property. An example of this Court's holdings is *Perez* v. *Campbell,* 402 U. S. 637 (1971), that the decision of the highest Court in Arizona was binding on the Supreme Court.

We would be remiss not to mention the landmark case of *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64 (1938), a diversity jurisdiction case, which held

that the Federal Courts are bound to apply the law as decided by the highest court of the State, in all matters except those in which some federal law is controlling, and must apply, as their rules of decisions, the law of the state including its common law.

Because Kentucky law will not permit a terminable, defeasible contract which grants a future interest dependent upon future performance, to be a fee simple; and because of the statute, 28 USC 1652, and the vast array of Federal, State and Supreme Court law upholding the statute, the decision of the Court of Appeals in this action should not be allowed to stand. It clearly violates the statute and the common law decided thereunder.

Argument 3

By awarding the Trustee a greater title than the Bankrupt had, or could have obtained, granting him the Total Benefits of an Executory Contract without requiring the performance of its burdens or conditions, the Court of Appeals' decision conflicts with the decisions of this Court and other Federal Courts.

A. THE COURT OF APPEALS CANNOT GRANT THE TRUSTEE GREATER RIGHTS UNDER THE CONTRACT THAN THE BANKRUPT HAD.

Again, we must examine the contract to see what rights the Bankrupt had. The contract provides that the Bankrupt was required to mine three million tons of coal from the land and pay for it at .33⅓ cents per ton over a period of ten (10) years, amounting to one million dollars ($1,000,000.00) in royalties. If this amount was mined, and the total royalties of $1,000,-

000.00 paid, then the Bankrupt was to receive a fee simple title to all coal *remaining* after the removal of the three million tons.

Never, was the Bankrupt granted or promised a fee simple interest in all the coal whether he mined, removed, and paid or not. Further, the contract provided that the Sloans could cancel for any breach of condition at any time and the lessee could cancel without cause. These contractural provisions are found in Appendix pp. 47a-48a.

The decision of the Court of Appeals gives the Bankrupt, (and presumably the Trustee), a fee simple interest to all coal, apparently without limitation, even though it recites one clause of the contract which indicates that fee simple was to be granted only to "remaining coal."

Bank of Marin v. *England,* 385 U. S. 99 (1966), holds:

> "The Trustee succeeds only to such rights as the Bankrupt possesses; and the Trustee is subject to all claims and defenses which might have been asserted against the Bankrupt but for the filing of the Petition."

The Court also stated in *Marin* that:

> "There is an overriding consideration that equitable principals govern the exercise of Bankruptcy jurisdiction."

Nothing would be more inequitable here than to take away the property of the Sloans, and transfer it to the Trustee, for the possible benefit of creditors of the

Bankrupt. Particularly, is this so when the Sloans have followed and relied on the requirements of the Bankruptcy statutes, filed their petition to reject as required under Chapter 11, and have not filed a Proof of Claim against the Bankruptcy estate under Chapter 7. Instead, it was the Trustee who did not do his duty and assume or reject, thereby bringing about this controversy.

In limiting the property interest that the Trustee receives, as successor to the Bankrupt, this Court has indicated that the Trustee occupies the same relation to creditors that the Bankrupt sustained prior to the inception of the proceeding; that the Trustee's rights are no greater than those of a judgment lien creditor. See *Zartman* v. *First National Bank,* 216 U. S. 134 (1910), *Lewis* v. *Manufacturers National Bank,* 364 U. S. 603 (1961), and at least 150 cases annotated in 11 USCA 110, Note 5, pp. 28-31.

The Sixth Circuit has followed these same principals a number of times, holding that the Trustee:

> ". . . has the lien of an execution creditor, which is about the lowest form of security."

See: Matter of Federals, Inc., 553 F. 2d 509 (6 Cir. 1977); in re: Richards, 455 F. 2d 281 (6th Cir. 1972); in re: Clemens, 472 F. 2d 939 (6th Cir. 1972); in re: Ali Kasovich 275 F. 2d 454 (6th Cir. 1960); in re: Troy 490 F. 2d 1061 (6th Cir. 1974); in re: Easy Living, Inc., 407 F. 2d 142 (6th Cir. 1979).

No creditor of the Bankrupt could have obtained an execution lien against the coal in the ground under the

Sloans' land at the inception of Bankruptcy because the Bankrupt's contract was in default, no mining was being done, and the Sloans owed the Bankrupt nothing. Bankrupt had no attachable claims against the Sloans. (In fact, the Bankrupt owed the Sloans for coal already removed under the contract). No property interest of any kind, deed, lease, or other conveyance was recorded in the Bankrupt's name. Accordingly, we believe that the Court of Appeals has granted to the Bankrupt a much greater interest than is permissible under the Bankruptcy Act and all the cases decided thereunder.

B. BY AWARDING THE TRUSTEE A GREATER TITLE THAN HE COULD OBTAIN BY CONTRACT OR BY STATUTE, THE COURT OF APPEALS' DECISION CONFLICTS WITH A GREAT NUMBER OF CASES THAT HOLD THAT THE TRUSTEE CANNOT BE AWARDED THE BENEFITS OF AN EXECUTORY CONTRACT WITHOUT ASSUMING ITS BURDENS.

In those cases in which the Trustee claimed a benefit or property interest under the contract without having assumed it or performed its burdens, the Courts have almost uniformly imposed a strict compliance with the statutory limitation of sixty (60) days under 11 USC 110(b) for automatic rejection of an Executory Contract. Some of those cases are: *Fletcher* v. *Surprise,* 180 F. 2d 669 (7th Cir. 1950), in which the Court said:

> "It is argued here that the failure of such compliance is only a technical obstacle, but in our opinion it goes to the heart of the controversy."

The Fletcher Court then went on to say:

> "Application of these principles leads irresistibly to the conclusion, so we think, that no interest or title which the Bankrupt had in the lease-hold estates passed to the Trustee. Section 70b, of course, provided a means by which the Trustee could have acquired such interest or title, but by failure to act he relinquished whatever right or claims he otherwise would have had."

The Fletcher case contains a rather comprehensive discussion of the requirements of assumption or rejection of an Executory Contract.

Aylward v. *Broadway Valentine Center, Inc.,* 390 F. 2d 556 (8th Cir 1968) required strict compliance and held that the automatic rejection "is conclusive as a matter of law." See also *Larkins* v. *Sills,* 377 F. 2d 1 (5th Cir. 1967), in re: *McCrory Stores Corp.,* 69 F. 2d 517 (2nd Cir. 1934), in re: *Luscombe Engineering Company,* 268 F. 2d 683 (3rd Cir. 1959), *Bank of America N.T.S.A.* v. *Smith,* 336 F. 2d 589 (9th Cir.).

The Sixth Circuit, like all the other Courts of Appeal, has held that a Trustee cannot be awarded the benefits of a contract without having accepted the burdens.

In the case of in re: *Ralston* (6th Cir. 1968) 401 F. 2d 293, the Court stated:

> "A Trustee in Bankruptcy may not blow hot and cold and if he accepts the benefits of a contract he accepts them *cum onere.* He may not receive the benefits and avoid the burdens."

Other Courts have uniformly enunciated the same principle. Some of these cases are: In re: *Italian Cook Oil Company,* 190 F. 2d 994 (3rd Cir. 1951), *Kirby* v. *U.S.A.,* 329 F. 2d 735 (10th Cir. 1964), matter of *Steelship Corp.,* 576 F. 2d 128 (8th Cir.) and the great number of cases annotated under West Federal Practice Digests Bankruptcy Key No. 254.

This same standard of refusing to award the Trustee any rights under an Executory Contract unless he has performed its burdens is continued under the new code, some of which authorities are: *Royal International Corporation,* 30 BR 750 (Ky. 1983); In re: *Capellen,* 39 BR 40 (Fla. 1984); In re: *Northwood Industries, Inc.,* 25 BR 210 (Wis. 1982); In re: *Shipley Junior,* 29 BR 13 (Ky. 1983).

All of the foregoing cases demonstrate that the Trustee could not be awarded greater benefits than he could have received under the Contract, or any of the contractual benefits, without having performed all of its burdensome conditions such as mining, removal, and payment of the coal, and that the Court of Appeals' decision conflicts with the general rule held by practically all Federal Courts.

Argument 4

Here, the Court of Appeals has changed the terms of the contract to convey a title that was not conveyed, and has denied the rights of termination expressed in the contract, and claimed by the Sloans, thereby denying the Sloans liberty and freedom of contract contrary to the Fifth Amendment of the Constitution of the United States.

A. FREEDOM OF CONTRACT IS PART OF THE LIBERTY PROTECTED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

All persons, of legal age, are free to make whatever contracts they please as long as the contracts are valid legal contracts in all respects and not contrary to public policy and as long as no fraud or deception is practiced therein. This liberty is a part of the liberty and property protected by the Fifth Amendment. See *Board of Regents* v. *Roth,* 408 U. S. 564 (1972); *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379 (1937); *Moorehead* v. *New York, ex rel. Tipaldo,* 298 U. S. 587 (1936); *United States* v. *Security Industrial Bank,* 103 S. Ct. 407 (1982).

See also: 16a Am. Jur.—2nd § 592 p. 522-525, 16A Corp. Jur. Sec. § 491 p. 567-569.

That the Bankruptcy power is subject to the Fifth Amendment prohibition against the taking of private property without compensation, see also, *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555 (1935).

That the right of termination is enforceable even against the Trustee, and after Bankruptcy, in further-

ance of the freedom of contract rights, is succinctly stated in the case of in re: Trigg, 630 F. 2d 1370 (10th Cir. 1980) as follows:

> "A contract that provides for termination on default of one party may terminate under ordinary principles of contract law, even if the defaulting party has filed a petition in bankruptcy."

Even if the Trustee had elected to assume the contract in the case at bar, the Sloans still had the right to cancel the contract as stated in the language of the Fifth Circuit in 1972 in *Schokbeton Industries, Inc.* v. *Schokbeton Products Corporation,* 466 F. 2d 171 (5th Cir. 1972) as follows:

> "As a logical result a Trustee's decision to adopt such a contract following the filing of a Bankruptcy petition, does not preclude the exercise of the other parties pre-existing right to terminate the agreement."

It is rare, indeed, that the question of whether a Court decision in and of itself can be an unconstitutional deprivation of liberty, or property as guaranteed by our Fifth Amendment. But, we believe that the contract, and the excerpt from Dr. Becknell's testimony (Appendix p.), that the Court's decision has deprived the Sloans of their freedom of contract and their property without any justification under the Constitution of the United States.

Argument 5

The Decision of the Sixth Circuit is so illogical, incompatible and incomplete on its fact that the supervision of this Court under Sup. Ct. Rule 17 is Necessary.

The Court of Appeals had before it all of the pleadings, all of the documents and all of the dates of each procedural step, and the orders and decisions of the District Court for the Eastern District of Kentucky, and the Bankruptcy Court for the Eastern District of Kentucky. The main thrust of these pleadings, orders, judgments, and documents showed that the Trustee had failed to assume or perform the contract within the statutory time limit.

In the face of these undisputed facts and documents the Sixth Circuit's decision omitted from its opinion, after stating the date of the filing in Bankruptcy and the date of filing of the Sloans' Petition to Reject, all other dates of any other orders, motions or decisions. These ommissions of the controlling dates amounts to a distortion of the facts. For instance, the time limit for granting an extension to assume or reject expired on December 12, 1972. Although the Court of Appeals' decision says that the application for extension of time was denied as moot, this is not correct. The judgment of the Bankruptcy Court entered July 19, 1976, did not deny the application for extension, but merely, stated that it was moot. In fact, the application was never denied or granted.

The Court of Appeals' decision cited no Kentucky law or other authority holding that a contract such as

the one at bar granted a fee simple interest. The cases cited by the Court of Appeals of *Godley* v. *Kentucky Resources Corporation,* 640 F. 2d 831 (6th Cir. 1981), and *Johnson* v. *Coleman,* 288 S. W. 2d 348 (Ky. 1956) do not hold that a lease contract is a fee simple deed. Of course, a lease of an interest in land is a conveyance of a land interest for a term conveying an estate for years terminable in accordance with the contract, but this was not in question.

In holding that the Bankrupt had a fee simple interest, the Court of Appeals quoted in its opinion one of the contract terms which stated "That the Bankrupt shall be and become the owner in fee simple of all coal remaining on those premises after payment of $1,000,000.00 royalty." In its decision the Court italicized the words "in fee simple of all coal", and ignored the qualification that meant, only, all coal *remaining after the payment of the royalty.* This recitation from the contract itself and the holding that the Bankrupt had a fee simple are incompatible with each other.

The Court of Appeals' decision then goes on to state: "We note that our decision does not alter the provisions of the Contract." This sentence is totally contradictory with the Court's decision to award a fee simple and to refuse to uphold the cancellation and termination clauses therein.

These inconsistencies and contradictions in the face of the opinion must lead to further litigation. The Sloans declared at the outset of this litigation that the contract was terminated by reason of its default; they will reaffirm that this contract is terminated under its

terms. It seems apparent that the Court of Appeals decision on the one hand states that the contract terms have not been altered and on the other hand drastically alters them.

A very noticeable defect in the Court of Appeals' decision is that it fails completely to state whether or not the Trustee succeeded to the fee simple title that it awarded to Becknell. The Bankruptcy Court judgment held that the Trustee had a fee simple interest. The District Court judgment affirmed the Bankruptcy Court that the Trustee had a fee simple interest. The Sixth Circuit opinion, that it affirms in part and reverses in part, fails to state, completely, what interest the Trustee has. Instead, it says the Trustee should have been given the opportunity to assume or reject the contract. We must then ask, *what has the Sixth Circuit held in reference to the Trustee's title?*

The Court's decision failed to give any instruction to the lower court on remand. This leaves open many questions such as:

1. Can the Trustee go back into the lower court and elect to assume the contract?

2. If the Trustee can now assume the contract is he not required to pay all of the royalties plus interest having accumulated since 1972, before such assumption?

3. Since the terms of the contract are not altered does the Sloans' termination rights still remain?

4. In view of the recitation of The Contract Clause expressed in the Court's decision, is it really

holding that the Trustee has title to all the coal, or *only to that coal remaining after three million tons have been mined,* in accordance with its quote from the contract?

5. Although the Court's opinion states that Becknell has fee simple title it does not expressly state that the Trustee succeeded to this same title. Instead, it seems to confuse Becknell with the Trustee in the remainder of the opinion (The last paragraph of the opinion states, inter alia "as a result Becknell must leave in place 300 foot blocks of coal at 1,500 foot intervals.")

Does the Court mean the Trustee must comply, since Becknell is not a party to this action, and will never have a chance to mine the coal because of the termination clauses in the contract.

We submit that by reason of the foregoing this Court should exercise its supervisory powers reversing the Sixth Circuit Court of Appeals with appropriate directions thereto.

CONCLUSION

This Petition for Certiorari should be granted for the reasons set out in the Argument above. The decision of the Court of Appeals seems to be judicial legislation. It changes the statutory limitation; it grants greater property rights to the Trustee than permitted by statute, and by case law, and it rewrites the terms of a valid contract depriving the Sloans of their freedom of contract. It is so contradictory on its face that it cannot be determined what the rights of the parties will

be on remand. It conflicts with the decisions of this Court, its own Circuit, and all other federal courts.

The decision of the Court of Appeals changes the law in Kentucky as to requirements of a fee simple title to Kentucky land. Kentucky is the leading coal producing state. Thousands of mineral leases containing terms similar to the one at bar could be drastically affected.

Perhaps a more compelling reason for granting this Petition for Certiorari, insofar as this and future generations of Americans are concerned, is to establish firmly the necessity of our lower courts to adhere to the rule of stare decisis and obey statutory mandates. An almost 95% certainty that a decision will not be reviewed brings about an erosion of the quality of justice. The exercise by this Court of its prime responsibility to insure the proper functioning of the federal judiciary, in this case, might be effective to discourage future departure from accepted judicial standards.

This case does not involve construction of the contract. It speaks for itself. Its terms are explicit, unambiguous, and even repetitive.

Judicial denial of valid contract rights, contrary to the very statutes enacted to protect such rights, and, refusal by the courts to enforce constitutional statutory provisions in reference to contracts, are as much a denial of civil rights to business men as failure to follow constitutional requirements in criminal matters is to criminals.

Here, each of the lower courts have rendered decisions contrary to statutory requirements and the over-

whelming case law. Why? Is it possible that their zeal to award the Trustee a windfall, and uphold a decision by a respected bankruptcy judge, is founded on the knowledge that this Court grants only a very small percentage of certiorari petitions? If not, why, then, did the Court of Appeals decision omit the crucial record facts, such as dates of performance or nonperformance as to the statutory requirements and the controlling clauses of the contract? Did the Lower Court rely upon the almost 95% certainty that this Court would not exercise its right of judicial supervision by denying certiorari?

The decision of the Court of Appeals is very cleverly written. By omitting the record facts (required dates of compliance with the statutes), and by omitting the controlling contractual clauses (cancellation and conditions precedent to obtaining title to remaining coal), the decision camouflages its defects, insulating itself from consideration by this Court. This type of decision leads to an erosion of our faith in our federal system, casts doubt that statutory requirements will be upheld, and, that valid contractual clauses will be enforced.

We respectfully submit that this petition for certiorari should be granted, not only to right the gross injustice of the Lower Court's decision and enforce the bankruptcy statutes and the laws governing fee simple title to Kentucky land, but, also, to demonstrate firmly that such departures from judicial standards will not be upheld by denial of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX 1

Nos. 83-5846, 83-5847

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

In Re:
BECKNELL & CRACE COAL CO., INC.,
Bankrupt.

.....

LOLA GAY SLOAN, et al.,
Plaintiffs,
TONY SLOAN, LOLA BETTYE SLOAN, NED T. SLOAN, JIMMIE SLOAN, MARGARET SLOAN and BRUCE SLOAN, *Plaintiffs-Appellants,* (83-5846),
JOHN A. SLOAN,
Plaintiff-Appellant, (83-5847)

v.

RUBEN G. HICKS, TRUSTEE,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

Argued Oct. 18, 1984.
Decided May 8, 1985.

NATHANIEL R. JONES, Circuit Judge.

Appellants, Lola Gay Sloan, Tony Sloan, Lola Bettye Sloan, Ned Sloan, Jimmie Sloan, Margaret Sloan, Bruce Sloan (the Sloans) and John Sloan, appeal from the district court's judgment, which affirmed the decision of the Bankruptcy Court. Upon consideration of the issues pre-

sented by this appeal, we affirm the Bankruptcy Court in part, reverse in part, and remand.

Becknell & Crace Coal Company, Incorporated (Becknell) entered into a "Lease-Purchase Agreement" with the appellants on January 22, 1970. After Becknell began mining coal on the land described in the Lease-Purchase Agreement, Becknell and appellants amended the Lease-Purchase Agreement by entering into two other written agreements. On January 31, 1971, Becknell gave two promissory notes totaling $56,827.61 to satisfy its debt for royalties due in 1970 (Agreement of January 31, 1971). On August 2, 1971, Becknell gave security for a default in royalty payments and in return the appellants revoked a termination of the Lease-Purchase Agreement and scheduled deferred royalty payments (Agreement of August 2, 1971).

In May of 1972, Becknell filed a proceeding under Chapter XI of the Bankruptcy Act, 11 U.S.C. §§ 301-399. On August 12, 1972, the appellants filed a petition to direct rejection of the Lease-Purchase Agreement as an executory contract under 11 U.S.C. § 110. Subsequently, Becknell's Trustee, Ruben Hicks, filed an answer to the petition and asserted a fee simple interest in the real estate subject to a lien reserved for the payment of the balance of the purchase price. Then, the Trustee filed an application for an extension of time to reject or assume the executory contract and moved for an order allowing his entry onto the land for certain purposes. The Bankruptcy Court granted the motion for entry and denied as moot the petition for an extension.

After trial, the Bankruptcy Court filed its memorandum opinion. The Court concluded that although the Lease-Purchase Agreement and its terms styled Becknell as a lessee, Becknell had a fee simple interest in the unmined coal. The court further concluded that the Lease-Purchase Agreement was not an executory contract within the mean-

ing of 11 U.S.C. § 110 merely because Becknell was obligated to pay royalties. Consequently, the court entered judgment in favor of the Trustee and thereby conveyed a fee simple in the coal to Becknell, a vendor's lien in the coal to appellants (to secure payment for the balance due on the purchase price), and a lien in the coal to Becknell's employees (to secure payment of their wages) pursuant to Ky. Rev. Stat. § 376.150.

On appeal, the District Court for the Eastern District of Kentucky found that the Lease-Purchase Agreement granted Becknell "an estate for years to the entire property in question subject to the limitation that it mine . . . according to the terms of the [Lease-Purchase Agreement] . . . *and* a contract right to mine and remove the coal underlying the surface." (emphasis in original) (brackets added). According to the district court, the Lease-Purchase Agreement did not give Becknell the type of contractual right subject to 11 U.S.C. § 110 because it was executory only as to Becknell's obligation to pay. The district court, therefore, affirmed the decision of the Bankruptcy Court. John Sloan and the Sloans appealed.

[1] As the district court noted, this appeal turns on (1) whether the Lease-Purchase Agreement conveys a fee simple title to the coal or only a lease to mine the coal and (2) whether the Lease-Purchase Agreement is executory in nature. Our review of the Bankruptcy Court's findings employs the standards which the district court applied in its review. "[W]e examine the decision of the court from which the appeal is taken for error and the legal determinations of the district court as a reviewing tribunal are not shielded by a presumption of correctness." *Universal Minerals, Inc.* v. *C. A. Hughes & Company,* 669 F. 2d 98, 101–02 (3d Cir. 1981).

I. ESTATE GRANTED

[2] The contract that created Becknell's interest is denominated a "Lease-Purchase Agreement" and, therefore, is a hybrid agreement whose "legal effect, under Kentucky law, differs from that of a lease for the use of surface land only." *Godley* v. *Kentucky Resources Corp.*, 640 F. 2d 831, 835, (6th Cir. 1981). Regardless of the agreement's denomination and hybrid characteristic, under Kentucky law "what is commonly termed a coal mining lease is regarded as the conveyance of an estate or interest in the minerals as land unless the terms of the instrument require a different construction." *Johnson* v. *Coleman*, 288 S. W. 2d 348, 349 (Ky. 1956). The district court concluded that the terms of the Lease-Purchase Agreement granted Becknell two interests: an estate for years subject to the limitation that it mine according to the Lease-Purchase Agreement and a contract right to mine and remove the coal.

John Sloan contends that the terms of the Lease-Purchase Agreement granted Becknell a fee simple title in the coal subject to a condition precedent that Becknell mine over 3,000,000 tons of coal. John Sloan further contends that because Becknell failed to perform that condition precedent Becknell never received a fee simple title to the coal.

The Sloans contend that the terms of the Lease-Purchase Agreement granted Becknell a lease rather than a fee simple absolute or fee simple conditional for several reasons. First, Becknell did not have an absolute right to permanently dispose of the property. Second, the Lease Purchase Agreement's granting provisions gave the Sloans a right of reversion. Third, there exists no employees' lien.

The Trustee contends that the terms of the Lease-Purchase Agreement gave Becknell a fee simple title for four reasons. First, the Lease-Purchase Agreement used the

magic words of grant that create a fee simple. Second, Becknell paid a substantial downpayment of $100,000 and was to pay the balance of $900,000 through royalties. Third, Becknell had the right to mine coal until the coal's exhaustion. Fourth, the Lease-Purchase Agreement was subject to an employees' lien under Ky. Rev. Stat. § 376.150.

[3] We believe that the terms of the Lease-Purchase Agreement granted Becknell a fee simple interest in the coal. The operable terms of the agreement support our conclusion. For example, the Lease-Purchase Agreement purported to bargain, sell, transfer, convey and lease unto . . . [Becknell and] its successors and assigns all the minable and merchantable coal in, under, and/or upon . . ." certain property. The Lease-Purchase Agreement further provided that:

> When One Million Dollars, ($1,000,000.00), not including wheelage fees, has been paid to the party of the first part; party of the second part [Becknell] shall be and become owner *in fee simple of all coal* remaining on these premises.

(brackets and emphasis added).

We believe further that Becknell's fee simple interest in the coal was not disturbed by either of the amendments to the Lease-Purchase Agreement. Instead, through the Agreement of January 31, 1971, Becknell gave two promissory notes in lieu of a case payment. Through the Agreement of August 2, 1971, Becknell partially paid for its default in royalties scheduled deferred payments for that default, assigned the proceeds from its future sales of coal, and gave an option to immediately terminate the Lease-Purchase Agreement in lieu of a presently exercisable option to terminate the Lease-Purchase Agreement and a presently exercisable demand on one of the two promissory notes.

II. EXECUTORY NATURE OF INTEREST

[4] The district court concluded that Becknell's contract right was not subject to 11 U.S.C. § 110 because it was not executory. John Sloan contends that the Lease-Purchase Agreement granted to Becknell a fee simple interest in the coal subject to a condition precedent—the mining of over 3,000,000 tons of coal. Because conditions precedent, according to John Sloan, are "universally described by the authorities as being executory," John Sloan concludes that the Lease-Purchase Agreement was executory.

The Sloans contend that the Lease-Purchase Agreement constituted an executory contract subject to the provisions of 11 U.S.C. § 110 because both Becknell and the Sloans were obligated to perform certain acts in the future. In support of that contention the Sloans identified a whole range of specific obligations that were to be performed by Becknell including a promise to pay the balance.

The Trustee contends that the Lease-Purchase Agreement was not executory for five reasons. First, the appellants had fully performed their obligations. Second, the only obligation that is not fully performed is Becknell's obligation to pay the balance. Third, that unperformed obligation to pay the balance does not create an executory contract that must be accepted or rejected. Fourth, the appellants' future obligations as listed by the Sloans are "actually rights consistent with their continued ownership of the surface and rights to monitor the method of accounting for amounts of coal removed which relate to payment for the coal." Fifth, the Lease-Purchase Agreement was subject to an employees' lien under Ky. Rev. Stat. § 376.150.

We believe that the contract is executory. This Court has stated that:

> The key, it seems, to deciphering the meaning of the executory contract rejection provisions, is to work backward, proceeding from an examination of the purposes rejection is expected to accomplish. If those objectives have already been accomplished, or if they can't be accomplished through rejection, then the contract is not executory within the meaning of the Bankruptcy Act.
>
> . . . .
>
> *Thus, executory contracts involve obligations which continue into the future.* S. Rep. No. 94–458, 94th Congress, 1st Sess. (1975). *They include leases, employment contracts and agreements to buy or sell in the future.* Generally, they are agreements which include an obligation for the debtor to do something in the future.

In Re Jolly, 574 F. 2d 349, 350–51 (6th Cir.) (emphasis added), *cert. denied*, 439 U. S. 929, 99 S. Ct. 316, 58 L. Ed. 2d 322 (1978). John Sloan, the Sloans, and Becknell had obligations to perform in the future. As a result, the Lease-Purchase Agreement was executory.

Because the Lease-Purchase Agreement was executory the Trustee should have been given the opportunity to assume or reject the contract. *See* 11 U.S.C. § 110. In the Bankruptcy proceedings the Trustee filed a petition for an extension of time to reject or assume the contract. The Bankruptcy Court, however, denied that petition as moot because it determined that the Lease-Purchase Agreement was not executory. The Trustee, therefore, did not have an opportunity to assume or reject the Lease-Purchase Agreement.

We, therefore, AFFIRM, in part, REVERSE, in part, and REMAND.. We also deny appellee's previously-refused motion for bond increase. We note that our decision does not

alter the provisions of the contract. As a result, Becknell must leave in place 300-foot blocks of coal at 1500-foot intervals. These blocks of coal as well as the surface rights were specifically reserved by the appellants.

APPENDIX 2-1

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
LONDON

In Bankruptcy
No. 72-650

IN RE
BECKNELL & CRACE COAL COMPANY, INC., BANKRUPT

LOLA GAY SLOAN, ET AL. - - - - *Plaintiffs*

v.

RUBEN G. HICKS, Trustee - - - - *Defendant*

JUDGMENT—Filed March 25, 1982

In accordance with the Memorandum of even date, it is ORDERED AND ADJUDGED that the decision of the Bankruptcy Court below be and is affirmed.

This 25th day of March, 1982.

(s) Eugene E. Siler, Jr., Judge

APPENDIX 2-2

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
LONDON

In Bankruptcy
No. 72-650

IN RE
BECKNELL & CRACE COAL COMPANY, INC., BANKRUPT

LOLA GAY SLOAN, ET AL. - - - - *Plaintiffs*

v.

RUBEN G. HICKS, Trustee - - - - *Defendant*

MEMORANDUM—Filed March 25, 1982

This case involves an appeal from a determination by Bankruptcy Judge Lee. Since the bankruptcy petition was filed before the effective date of the 1978 bankruptcy law revisions, it is to be decided in accordance with the pre-revision law.

FACTS

The appellants are the owners of real estate which appears to contain valuable coal deposits. They entered into a "Lease Purchase Agreement" with the bankrupt under the terms of which the bankrupt was to mine this coal. The principal point of contention in this case is whether the agreement should be categorized as a sale of an interest in this coal or merely a lease of real property.

Upon the filing of the bankruptcy petition, a trustee was appointed. Pursuant to § 70(b) of the old Bankruptcy Act, 11 U.S.C. § 110(b), the trustee must promptly act to accept any outstanding executory contracts or they are deemed to have been rejected by operation of law. In this case, the trustee moved the Bankruptcy Court for an extension of time in which to accept or reject the contract in issue, but the Bankruptcy Court declared the motion to be moot, as it decided the contract was not executory.

The trustee contended that agreement was not a lease contract (executory in nature) but actually a conveyance in fee simple of the coal underlying the land. The Bankruptcy Court accepted this argument and held for the trustee.

APPELLANT'S ARGUMENT

It is the position of the appellants that the agreement was a lease in the form of an executory contract when the petition for bankruptcy was filed. Since the trustee did not timely accept it, they contend he no longer has any interest under the argument.

Counsel for the appellants has set forth a very persuasive argument in support of their position. The following is a summary of what this Court feels to be the major points of contention raised by the appellants in support of their argument that the Bankruptcy Court has failed to take into account many important factual considerations in arriving at its decision.

1. Testimony of Dr. Becknell (President and Director of the bankrupt) was ignored by the Court in its finding that the instrument in question was not an executory contract.

2. The fact that the agreement was carried on the books of the bankrupt as a lease and was referred to as such throughout the agreement.

3. Various duties of future performance by both the lessor and lessee were ignored by the Court.

4. The requirement that 3,000,000 tons of coal were to be mined over a period of ten years before any right to mine the remaining coal would be granted to the bankrupt.

FINDINGS AND CONCLUSIONS OF THE BANKRUPTCY COURT

In order to determine whether the appellants' argument is meritorious, it will be necessary to examine more closely the holding of the Bankruptcy Court. The trustee below argued that the agreement in issue amounted to a deed to the coal underlying the land owned by the appellants. In accepting this argument, the Bankruptcy Court appears to have considered all the evidence presented to it. The testimony of Dr. Becknell appears to have been given a good deal of consideration. However, the Court chose to reject such testimony. It stated:

> The trustee in bankruptcy is not bound by the sworn statements of Dr. Becknell, a physician, as to the nature of the agreement between Becknell & Crace Coal Company, Inc. and the plaintiffs. The nature of the contract is a question of law to be determined by the court. In any event, the sworn statements of Dr. Becknell appearing in the Statement of Affairs and Statement of Executory Contracts accompanying the Chapter XI petition are not at variance with his testimony under oath, and such evidence, even if admitted, would be merely cumulative in nature.

The Bankruptcy Court took into consideration various other aspects of the lease upon which the appellants rely in support of their argument. The Court considered the 30 year lease provision and chose to reject the appellants'

argument on that point. Instead, the Bankruptcy Court found the agreement, when considered as a whole, conferred upon the bankrupt the right to mine coal in perpetuity and not for a term of years. Another provision of the lease provided as follows:

> Upon the resumption of the mining and removal of coal in excess of three million tons, party of the second part shall have complete ownership and clear title to any coal remaining and the free rights to mine same. As it is part of this lease purchase agreement that upon receipt of One Million Dollars ($1,000,000.00), Nine Hundred Thousand Dollars ($900,000.00), royalty and the initial One Hundred Thousand Dollars, ($100,000.00), payment, the first party grants complete ownership of the coal and coal mining rights to the second party.

The Court chose to construe such language to be inconsistent with the words of present demise appearing at the beginning of the agreement. The Court viewed this inconsistency as an "inartfully expressed vendor's lien."

The Court made the following conclusions:

> To a great many people who do not live in the coal counties, an instrument having the usual terms and attributes of a lease would seem to be a lease. Nevertheless, there is a substantial body of law to the effect that the grant of the right to mine coal in the land of the lessor, and to remove the coal therefrom, although the instrument may be called a "lease," is a grant of an interest in the land itself, and not a mere license to take coal. . . . It is nonetheless a sale if the parties called a deed a "lease" and styled themselves "lessor and lessee," and contracted that in case of nonpayment of the "royalty" the grantor should

> have the right of distress, or at his option the right to forfeit the grant.

School Dist., etc. v. *City of Philadelphia,* 79 A. 2d 433, 436 (1951). The Bankruptcy Court went on to state,

> Whether a lease such as the instant one is merely a lease of the land with the privilege of removing minerals during a certain period, or is in reality a sale of land, is a question which is largely determined by the facts of each individual case and which is answered differently in different jurisdiction.

Kennedy v. *Hicks,* 180 Ky. 562, 203 S. W. 318, 320 (1918). In support of its holding that the agreement was a sale of the coal interest in fee simple, the Bankruptcy Court found the case to be analogous to *Ramsey* v. *Yunker,* 311 Ky. 820, 226 S. W. 2d 14 (1950). In the *Ramsey* case, the Kentucky Court of Appeals held the instrument in question to be a deed to the minerals in place because it had all the earmarks of an outright conveyance.

The Court below further held:

> [T]he contract in question is not executory as claimed by the Sloans [appellants]. . . . The only thing that remains executory about this lease is the bankrupt's obligation to pay. Consequently, it is not the kind of contract which the trustee must be deemed to have rejected if he does not assume it within the time limits fixed by section 70(b) of the Bankruptcy Act, 11 U.S.C. § 110(b). *Stell Manufacturing Co.* v. *Gilbert,* 372 F. 2d 113, 115 (5th Cir. 1967); *In re Kosting,* 350 F. Supp. 1071 (D.C. Conn. 1972).
>
> A contract which is executory only in the sense that it provides the fully performed nonbankrupt with a claim against the estate is not one which must be assumed or rejected. Section 70(b) and related pro-

visions of the Act are not concerned with claims provable against the estate under § 63a but with assets of the bankrupt which pass to the trustee under 70a.

ISSUES TO BE IDENTIFIED

The appellants recognize where there is conflicting testimony or questions of credibility, the trial court's findings are entitled to be given great weight and should be overturned only if found to be clearly erroneous. However, it is their position that the facts in the present case are undisputed and this Court is in as good a position as the Bankruptcy Court to construe the terms of the agreement; therefore, this Court should not be bound by the Bankruptcy Court's findings of fact and conclusions of law. This position appears to be well taken.

Rule 810 of the Bankruptcy Rules provides as follows:

> Upon an appeal the District Court may affirm, modify, or reverse a referee's judgment or order, or remand with instructions for further proceedings. The Court shall accept the referee's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the referee to judge the credibility of the witnesses. The rule defines the judge's authority in disposing of judgments, orders and findings on review in conformity with Section 2, sub. a(10) of the Act, 11 U.S.C. 11(a)(10), and requires the same effect to be given the referee's findings as Rule 52(a) of the Federal Rules of Civil Procedure accords to the findings of the trial court.

In re Dolnick, 375 F. Supp. 84 (N.D. Ill. 1974). However, this Court has previously held that where the facts are not in dispute, the reviewing court is free to examine the legal conclusions of the Bankruptcy Judge and to reject them if they are erroneous. *National Cash Register* v.

K.W.C., Inc., 432 F. Supp. 82 (E.D. Ky. 1977). This appears to be the situation presented to the Court in this appeal. As the Court below stated, "The nature of the contract is a question of law to be determined by the Court." Therefore, the "clearly erroneous" standard should not be applied. Instead, this Court will freely examine the conclusions determined by the Bankruptcy Court below.

The conclusions are twofold. They are:

1. Whether the Lease Purchase Agreement, as written, conveys fee simple title to the coal deposits in issue or whether the agreement merely constitutes a lease to such property, and

2. Whether the agreement is executory in nature.

CONCLUSION

Since the agreement in question purports to affect title to Kentucky land, the law of Kentucky should be applied. *Belcher* v. *Elliott*, 312 F. 2d 245 (6th Cir. 1963). It is generally recognized under the law of Kentucky to be the duty of the courts to construe contracts so as to arrive at the intention of the parties as expressed in the instrument as a whole, considering the subject matter of the contract, the situation of the parties and the conditions under which the contract was written. *Lafevers* v. *Lafevers*, 255 S. W. 2d 985 (Ky. 1953). However, "an unambiguous instrument conveying property or specified property rights, must be construed according to its terms, not according to its creator's intent, and is in and of itself generally determinative of the nature and extent of a conveyance." *Godley* v. *Kentucky Resources Corp.*, 640 F. 2d 831, 835 (6th Cir. 1981), *citing Phelps* v. *Sledd*, 479 S. W. 2d 894 (Ky. 1972); *Inland Steel Co.* v. *Isaacs*, 291 S. W. 2d 522 (Ky. 1956); *Buchanan* v. *Watson*, 290 S. W. 2d 40 (Ky. 1956). In regard to this point, the court below found an

ambiguity existed in that the contract in issue contained words of present demise which appeared inconsistent with the remainder of the agreement. The appellants dispute this and in their argument relating to this point have referred this Court to *Caldwell's Kentucky Form Book,* 3d Ed., Form 59.2 page 744 (entitled "Coal Lease"). The appellants appear to have patterned their agreement to conform with this model in several sections. This form contains words of present demise which the Court below found sufficient to constitute an ambiguity. While form books are not "legal authority" upon which this Court may rely for legal conclusion, compliance with such forms indicates the agreement does not contain the type of ambiguity which the Bankruptcy Court found to exist. This error is not crucial to the outcome of the present case; in fact, such a holding detracts from several major points of contention raised by the appellants in their briefs to this Court. Having found no ambiguity to exist on the face of the agreement in issue, this Court may determine the effect of the instrument without recourse to a trier of fact and without consideration of the intent of the parties. *Godley* v. *Kentucky Resources Corp., supra,* at 835.

In *Godley,* the Sixth Circuit was presented with interpretation of a lease agreement similar to that presently before this Court. In that case, the Court made the following statement regarding coal leases:

> While termed a "lease," the agreement between Piedmont and the Grahams is in fact a hybrid instrument. Its legal effect, under Kentucky law, differs from that of a lease for the use of surface land only. The "lease" not only gives the lessee the right to occupy the property for a term of fifteen years, but also incorporates an agreement to sell a portion of the realty. *Mills* v. *Mills,* 275 Ky. 431, 121 S. W. 2d 962 (1938). As con-

> sideration for the agreement, the lessee makes certain covenants and agrees to pay a fifty cent "royalty" on each ton of coal removed. In addition, the lessee promises to remove a minimum amount of coal each year of the lease, until such time as minable, merchantable coal is no longer to be found on the property in sufficient amount to meet the minimum requirements.

Id. at 835. Therefore, it is the conclusion of this Court that the bankrupt of this action was granted an estate for years to the entire property in question subject to the limitation that it mine the property according to the terms of the agreement in issue, *and* a contract right to mine and remove the coal underlying the surface. *See id.* at 836; *Head* v. *Little,* 312 Ky. 10, 226 S. W. 2d 322 (1950).

It is the contract right which may be subject to § 70b of the Bankruptcy Act. As to this issue, the Bankruptcy Court was correct in its determination that the agreement was not executory in nature. In a literal sense, "All contracts to a greater or less extent are executory. When they cease to be so, they cease to be contracts." 1 Williston, *Contracts* § 14 (3d Ed. 1957). However, applying such a definition to the situation presented to this Court would prove futile. In the bankruptcy context, "an executory contract has been defined as one in which a party binds himself to do or not to do a particular thing, whereas an executed contract is one in which the object of the agreement is already performed." *In Re Rovine Corp.,* 5 B. R. 402, 404 (1980). Executory contracts generally include contracts on which performance remains due to some extent on both sides. *Id.* at 404. A contract so nearly performed by the nonbankruptcy party that failure to complete performance would not be sufficiently material to excuse performance by the bankruptcy should not be treated as an executory contract in bankruptcy. This appears to be the situation presented herein. The agreement is no longer

executory within the meaning of the bankruptcy statute but is a partially executed contract, executory only as to the obligation of the bankrupt to pay. This is not the type of contractual situation to which § 70b is applicable and, therefore, the holding of the Bankruptcy Court will be affirmed.

This 25th day of March, 1982.

(s) Eugene E. Siler, Jr.
Eugene E. Siler, Jr., Judge

APPENDIX 2-3

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
LONDON

In Bankruptcy
No. 72-650

IN RE
BECKNELL & CRACE COAL COMPANY, INC., BANKRUPT

LOLA GAY SLOAN, ET AL. - - - - *Plaintiffs*

v.

RUBEN G. HICKS, Trustee - - - - *Defendant*

ORDER—Filed October 13, 1983

The Court having considered the briefs and oral argument of all parties concerning the motions of the appellants to amend the Court's findings, to make additional findings of fact and to set aside the judgment of this Court, and although the Court is mindful that the appellants have made a very forceful argument, the previous Memorandum in this case on March 25, 1982, gives a correct statement of the law and should not be disturbed. Therefore, it is hereby

ORDERED that the motion by the appellants to amend or make additional findings of fact and to set aside the Judgment, be and is denied.

This is a final Order and there is no just reason for delay.

This 13 day of October, 1983.

(s) Eugene E. Siler, Jr.
Judge

APPENDIX 2-4

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
LONDON

In Bankruptcy
No. 72-650

IN RE
BECKNELL & CRACE COAL COMPANY, INC., BANKRUPT

LOLA GAY SLOAN, ET AL. - - - - *Plaintiffs*

v.

RUBEN G. HICKS, Trustee - - - - *Defendant*

MEMORANDUM OPINION—Filed July 19, 1976

This matter is before the Court on the motion of eight members of the Sloan family who are owners of property in Wayne and Clinton counties, Kentucky for an order adjudging that by operation of law pursuant to §70b of the Bankruptcy Act, 11 U.S.C. §110b, the trustee must be deemed to have rejected a contract between the movants and the bankrupt for the mining of coal. The movants contend that the statutory period during which the trustee might have assumed the executory contract has passed and that therefore the contract must be deemed to have been rejected.

The trustee objects to the characterization of the contract as executory within the meaning of §70b. He asserts

that the contract is a deed to the coal underlying the land rather than a lease with an option to purchase the coal. The trustee contends that the contract being a deed is not executory within the meaning of §70b and that therefore he was not required to assume it and its continuing requirements in order for title to the coal to remain in him as trustee of the bankrupt's estate.

The Court is inclined to agree with the trustee that a determination of what the contract conveyed does make a difference as to whether or not the contract is executory within the meaning of §70b.

FINDINGS OF FACT

On January 22, 1970, the several members of the Sloan family, as parties of the first part, and the bankrupt Becknell and Crace Coal Company, Inc., as party of the second part, entered into a "Lease-Purchase Agreement" providing that the Sloans "do hereby bargain, sell, transfer, convey and lease unto the party of the second part, its successors and assigns, all the mineable and merchantable coal, in, under and/or upon Poplar and Short Mountains in Wayne and Clinton Counties, Kentucky, more particularly described as follows. . . ."

The agreement provides that "the said parties of the first part do hereby further grant unto said party of the second part, its successors and/or assigns, the right and license to enter upon the premises . . . at all times, and to use so much of the surface thereof as may be reasonably necessary . . . to dig, mine and remove said coal therefrom by whatever means deemed practical by the party of the second part, including strip mining methods, deep mining method, or auger mining method, together with all and singular the rights, privileges, licenses and easements necessary . . . to the proper prosecution of the business of min-

ing and removing said coal . . . and the right to occupy so much of the surface of said premises as may be reasonably necessary for the storing of said coal, and depositing the refuse therefrom, and the right to erect on said premises such buildings, structures and fixtures as may be necessary . . . to the proper prosecution of said business of coal mining."

By its terms the Lease-Purchase Agreement contains words of present demise of all the coal in place to Becknell and Crace Coal Company, together with the right and license to enter upon the premises to remove the coal and to occupy so much of the surface of the premises as may be reasonably necessary for that purpose.

It is clear the agreement conveys to Becknell and Crace Coal Company all the coal in place in the premises, and not just so much of the coal as is removed, and further that it confers upon the bankrupt the exclusive right to remove the coal.

The agreement confers upon the bankrupt the right to mine the coal to exhaustion. The bankrupt covenanted to "diligently prosecute the mining operations hereunder throughout the life of this lease unless stopped by strikes, riots, acts of God, unfavorable market conditions, lack of transportation facilities, or other casualties or misfortunes beyond (its) control." However, the bankrupt was given the right to abandon the premises on giving 30 days written notice to the parties of the first part, ". . . if, in (its judgement, at any time the mining of said coal shall be or become unprofitable, or if from any other cause said party of the second part in its discretion shall conclude to abandon the said premises . . ." In the event of such abandonment the party of the second part remains "liable for all royalties and monies due up to the time of such termination."

At the hearing on the motion of the trustee in bankruptcy for a determination of the nature of the interest of

the trustee in the coal underlying the Sloan property, Dr. W. E. Becknell, President of the bankrupt, testified the bankrupt had 30 years to mine the coal on the property. However, the thirty-year provision appearing in the last paragraph on page 14 of the Lease-Purchase Agreement (Trustee's Exhibit No. 1) is not a limitation on the life of the lease. It provides that ". . . after a period of thirty years from the date hereof, party of the second part will pay any damages done to the property in respect to any development, or land restoration on said property, that is caused by mining coal." Consequently, the agreement confers upon the bankrupt the right to mine the coal in perpetuity and not for a term of years.

As consideration for the Lease-Purchase Agreement, Becknell and Crace Coal Company made a front-end cash payment of $100,000.00 representing a royalty of 33½ cents per ton on 300,000 tons of coal. However, the agreement provided that this payment was to be credited as payment in full for tonnage mined after the first 2,700,000 tons had been mined and removed, or in other words for tonnage mined between 2,700,000 and 3,000,000 tons, but was "not refundable or credited to the party of the second part under any other circumstances." In the event the party of the second part should fail to remove the tonnage from 2,700,000 to 3,000,000 tons the front-end payment of $100,000.00 was ". . . designated as liquidated damages to the first parties, due to them because of the second party's failure to mine said quantities of coal." The agreement provides that:

> ". . . Upon the resumption of the mining and removal of coal in excess of three million tons, party of the second part shall have complete ownership and clear title to any coal remaining and the free rights to mine same. As it is part of this lease purchase agreement

> that upon receipt of One Million Dollars ($1,000,000.00), Nine Hundred Thousand Dollars ($900,000.00), royalty, and the initial One Hundred Thousand Dollars, ($100,000.00), payment, the first party grants complete ownership of the coal and coal mining rights to the second party."

This language is of course inconsistent with the words of present demise to the coal appearing at the beginning of the agreement. The inconsistency can be reconciled by construing the last quoted language to be an inartfully expressed vendor's lien, and the court so construes the language.

The agreement binds Becknell and Crace Coal Company to mine not less than 300,000 tons of coal annually and remove same from said premises, but also binds the coal company to pay a minimum royalty of $100,000 annually whether or not that amount of coal is mined, subject to having such payment credited as royalty for coal in excess of 300,000 tons mined in any succeeding year. As additional consideration the coal company granted the Sloans right of way privileges.

At their option, the Sloans could declare the Lease-Purchase Agreement null and void if the coal company failed to pay any of the royalties. The language of the default provisions of the contract is as follows:

> (f) Upon the termination of this lease and agreement by exhaustion of the minable coal or otherwise, said party of the second part may remove from said premises all buildings, structures, fixtures, railroads, and other property placed on said premises by it or its assigns. Provided however, if said party of the second part shall fail to pay any of the royalties or payments at the time and in the manner hereinabove provided, or shall fail to keep and perform any of the covenants and

agreements on its part to be kept and performed hereunder, and shall continue in default and fail to remedy such breach for a period of thirty (30) days, after written notice thereof by parties of the first part, then this lease and agreement shall be null and void at the option of said parties of the first part. And it shall be lawful for said parties of the first part to enter on said premises and expell said party of the second part therefrom and again have and possess and enjoy same as if this agreement and lease had not been made.

On January 31, 1971, when the coal company was $56,827.61 behind in royalty payments, the parties entered into a second agreement (Trustee's Exhibit No. 2) whereby the Sloans agreed to accept, in lieu of royalty payments due under the Lease-Purchase Agreement, two promissory notes of the coal company which were personally guaranteed by Dr. W. E. Becknell, Dr. James L. Becknell, and Fred Strong.

On August 2, 1971, when the coal company had not made royalty payments for April, May and June of 1971, the parties entered into a third agreement (Trustee's Exhibit No. 3). Rather than exercise their option to terminate the agreement the Sloans agreed to accept delayed royalty payments. The coal company also agreed that in the event of further default it would execute an assignment of proceeds of coal sales to assure payment of royalties.

CONCLUSIONS OF LAW

Minerals in place are land. They are subject to conveyance. The surface right may be in one man, and the mineral right in another. Kincaid v. McGowan, 88 Ky. 91, 4 S. W. 802; 140 Am. St. Rep. 951.

Whether a lease such as the instant one "is merely a lease of the land with the privilege of removing the min-

erals during a certain period, or is in reality a sale of the land, is a question which is largely determined by the facts of each individual case and which is answered differently in different jurisdictions. 18 R.C.L. 1186 Kennedy v. Hicks, 180 Ky. 562, 203 S. W. 318, 320.

To a great many people who do not live in coal counties, an instrument having the usual terms and attributes of a lease, would seem to be a lease. Nevertheless, there is a substantial body of law to the effect that the grant of the right to mine coal in the lands of the lessor, and to remove the coal therefrom, although the instrument may be called a "lease", is a grant of an interest in the land itself, and not a mere license to take coal. School Dist., etc. v. City of Philadelphia, 79 A. 2d 433, 436.

For example, it is settled law in Pennsylvania that a lease of coal in place, with a right to mine the mineral to exhaustion, is a sale of an estate in fee simple and leaves the lessor with only an interest in the royalties to be paid to him under the lease. Smith v. Glen Alden Coal Co., 347 Pa. 290, 298, 32 A. 2d 227, 232.

It is nonetheless a sale if the parties called the deed a "lease" and styled themselves "lessor and lessee," and contracted that in case of nonpayment of the "royalty" the grantor should have the right of distress, or at his option the right to forfeit the grant. School Dist., etc. v. City of Philadephia, supra, at page 436.

In Kentucky it has been held that for many purposes a mineral lease operates as a severance of the surface and mineral estates. This is especially true for purposes of taxation. Wolf County v. Beckett, 127 Ky. 252, 105 S. W. 447. In the latter case the Court observed as follows:

> ". . . It is contended, however, that property held under lease is not subject to taxation in the hands of the lessee. As a general proposition this is true, but there is a wide difference between an ordinary lease of

lands and an oil and gas lease. Under the former, the lessee has only the right to occupy and cultivate the land, and take therefrom the growing crops. At the expiration of his lease, the property is intact. Its condition is substantially the same as it was when he entered upon the land. The property of the lessor's not diminished. Its value is practically the same. This is not true, however, of any oil or gas lease. The latter carries with it not only the privilege of going upon the lands for that purpose, but the right to take therefrom during the continuance of the lease such oil or gas as may be found. Title to the oil or gas is vested in the lessee by the lease. It is his property of recognized value. He controls it and disposes of it as his own. Not only is the oil or gas property, but the lease under which it is taken from the ground is property which has substantial value and is the subject of frequent sale . . .

"It is contended, however, that the oil in situ, being part of the realty, cannot be severed therefrom except by deed. It is admitted the leases held by the appellees are of the usual kind. They give the appellees the right to drill and operate for oil and gas for a definite term of years, and, in case oil or gas is found in paying quantities, to continue such operations so long as same is found in quantities that pay. Appellees agree on their part to deliver one-eighth of all oil found by reason of such operations in suitable pipe lines to the owner of the fee, the lessor, and to pay a fixed sum per year for each well the product of which is carried and marketed from the premises. The remainder of the oil or gas is the property of the lessees. Why, then, say that a deed is necessary to sever the oil from the realty, when the lease accomplishes the same result. . . . we therefore conclude that the form of the con-

tract is immaterial and that it makes no difference whether the oil or gas privileges be conveyed by deed or lease, just so the effect of the instrument is to vest in the lessee property rights to the oil or gas that may be found in paying quantities on the premises leased.

". . . Who can say a conveyance of coal in fee does not create a separate property, taxable as such. Why is not a long lease vesting the lessee with right to take coal not a valuable separate property? The surface owner has lost dominion over the coal. The lessee has complete dominion. Still each has a property, taxable distinctly . . ." Id, pgs. 448-449.

In Kennedy v. Hicks, 180 Ky. 562, 203 S. W. 318, involving a 99-year lease granting to the lessee the exclusive right of quarrying, drilling and digging for minerals and oil or any kind in consideration of $200 cash in hand, plus $300 to be paid when the lessee commenced to remove stone from the land, it was held that such manner of payment fixed the character of the lease as a conveyance of real estate.

In the *Hicks* case, under the terms of the instrument, the consideration was payable before severance of the minerals. The Court observed that when consideration is not payable until after severance, the contract may be a sale or an agreement to sell realty or personalty, dependent upon the language employed. The Court said ". . . the owner may convey minerals . . . in such a manner that there is no present consummated sale or in such a manner that there is a present consummated sales, depending on whether title to the minerals vests in the vendee before or after separation . . ."

This latter statement is illustrated by the different results reached in the cases of Duncan v. Greene, 253 S. W. 2d 592 (Ky. 1952) and Ramsey v. Yunker, 226 S. W. 2d 14, 311 Ky. 820 (1950). In Duncan v. Greene, 253 S. W. 2d

592, (1952) the Court held a contract whereby the first parties granted to the second parties the exclusive right to drill wells "for the purpose of procuring natural gas . . . and the ownership of said products when procured . . ." was in the nature of a contract for development of property and could not be classified as a deed. The Court said there clearly was no severance of an estate in land. There was a privilege granted to reduce to possession, and to own the oil and gas actually extracted, not the oil and gas in place.

In Ramsey v. Yunker, 226 S. W. 2d 14, 311 Ky. 820 (1950), the deed of conveyance granted to the party of the second part ". . . all of the oils and gases and all rights thereto . . . in, upon or over or hereafter found in, upon or under the herein described tracts or parcels of land . . . with the exclusive right to enter upon the lands for the sole purpose of operating for, producing, storing and marketing oil, gas and gasoline. . . ." The Court held the instrument was a deed to the oil and gas in place because it had all the ear marks of an outright conveyance.

The instrument hereunder consideration falls somewhere in between the instruments construed in the *Duncan* and *Ramsey* cases. However, it is more like the instrument involved in the *Ramsey* case because it contains words of present demise conveying title to the coal in place and not merely title to the coal subsequently procured or removed. The Court interprets the lease in this case to vest title to the coal in the lessee before separation from the real estate. See Ky. Natural Gas Corp. v. Carter, 198 S. W. 2d 311, Ky. (1946).

In Williamson v. Williamson, 223 Ky. 589, 4 S. W. 2d 392, the Court held a coal mine lease was not an absolute grant, because it did not confer upon the lessee the right to mine all the coal to exhaustion. Consequently, title to

the coal in place remained in the lessor and his widow was only entitled to a one-third dower interest therein instead of a one-half dower interest in the royalties, as might have been the case if the lease had effected a severance of the minerals.

In the *Williamson* case the Court gratuitously and erroneously suggested that later Pennsylvania cases have modified the doctrine that the right to extract the mineral to exhaustion constitutes a sale of the mineral, although paid for by royalties as and when the mineral is exhausted. Actually, later Pennsylvania cases have reiterated and reenforced the doctrine. Smith v. Glen Alden Coal Co., 32 A. 2d 227 (1943); Hummel v. McFadden, 150 A. 2d 856 (1959); In re Essex Coal Company, 192 A. 2d 675 (1963).

In Hummel v. McFadden, 150 A. 2d 856 (1959), the Court enumerated three tests for determining whether an agreement, even though it may be denominated a lease, constitutes a sale of coal in place. If the agreement confers upon the vendee (1) the exclusive right to extract the coal, (2) the right to all the coal, that is the right to mine the coal to exhaustion, and (3) requires the vendee to pay a minimum royalty, that is to pay for the coal even though it is not mined, then the agreement is a sale of the coal in place.

The lease involved in the present case meets all these criteria. Therefore, the Court finds the bankrupt has fee simple title to the unmined coal underlying the Sloan properties.

This being so, the contract in question is not executory as claimed by the Sloans. Plummer v. Hillside Coal & Iron Co. 104 F. 208, 211 (3rd Cir. 1900).

The only thing that remains executory about this lease is the bankrupt's obligation to pay. Consequently, it is not the kind of contract which the trustee must be deemed to have rejected if he does not assume it within the time

limits fixed by section 70(b) of the Bankruptcy Act, 11 U.S.C. §110(b). Stell Manufacturing Co. v. Gilbert, 372 F. 2d 113, 115 (5th Cir. 1967); In re Kosting, 350 F. Supp. 1071 (D.C. Conn. 1972).

A contract which is executory only in the sense that it provides the fully performed nonbankrupt with a claim against the estate is not one which must be assumed or rejected. Section 70(b) and related provisions of the Act are not concerned with claims provable against the estate under §63a but with assets of the bankrupt which pass to the trustee under 70a.

The nonbankrupt party who has fully performed may have provided an asset which comes into the bankrupt estate and which the trustee will have the option to abandon or accept. If the trustee does accept the property, he accepts it *cum onere*. But the trustee's acceptance of such property does not amount to assumption of the contract of sale. Countryman, Executory Contracts in Bankruptcy: Part I, 57 Minn. L. Rev. 439, 456-457.

Under Kentucky a perfect legal title to minerals in place is not lost by failure of the owner to conduct mining operations. Duncan v. Mason, 239 Ky. 5[illegible], 39 S. W. 2d 1006 (1931).

Moreover, on the facts of this case the lessors cannot recover title to the coal by an action in ejectment. All the lessors are entitled to is the balance due on the purchase price of the coal. Day v. Miles, 204 Ky. 711, 265 S. W. 282 (1924), cf. Maschinst v. Moore, 275 Ky. 36, 120 S. W. 2d 750 (1938).

The trustee in bankruptcy owns title to the coal in place under the Sloan property. The Sloans have a lien on the coal to secure the balance due on the purchase price. The trustee has the option of selling the coal free and clear of liens and paying off the balance due on the purchase price, or he may want to disclaim interest in the

coal as being of less value than the balance due on the purchase price and other liens thereon.

The trustee does not have to either assume or reject the Lease-Purchase Agreement of January 22, 1970 in order to exercise the options above enumerated.

It is ordered that copies of this Memorandum Opinion be served by mail upon the parties shown below.

At Lexington, Kentucky, July 19, 1976.

(s) Joe Lee
Honorable Joe Lee
Bankruptcy Judge

Copies to:

William S. Howard
Ruben G. Hicks
Elmer Morgan

APPENDIX 2-5

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
LONDON

In Bankruptcy
No. 72-650

IN RE
BECKNELL & CRACE COAL COMPANY, INC., BANKRUPT

LOLA GAY SLOAN, ET AL. - - - - *Plaintiffs*

v.

RUBEN G. HICKS, Trustee - - - - *Defendant*

JUDGMENT—Filed July 19, 1976

1. The petition of Lola Gay Sloan, Tony Sloan, Lola Bettye Sloan, Ned T. Sloan, Jimmie Sloan, John Sloan, Margaret Sloan and Bruce Sloan filed herein on August 21, 1972, for an order rejecting the Lease-Purchase Agreement of January 22, 1970 as executory should be and hereby is denied.

2. The trustee's application of November 3, 1972, to extend the time to assume or reject the contract of January 22, 1970, if executory, is moot since the Court has determined the contract is not an executory contract within the meaning of that term as used in section 70b of the Bankruptcy Act, 11 U.S.C. §110b.

3. The relief requested on behalf of Lola Gay Sloan, Tony Sloan, Lola Bettye Sloan, Ned T. Sloan, Jimmie

Sloan, John Sloan, Margaret Sloan, and Bruce R. Sloan in their response filed herein on November 21, 1972, to the trustee's application to extend the time to accept or reject the contract of January 22, 1970, is denied, except as follows:

The trustee holds title to the coal in place under the Sloan properties.

The Sloans have a vendor's lien on the coal in place to secure the payment of the balance due on the purchase price.

Under the provision of KRS 376.150 the employees of the bankrupt also have a lien on the coal in place to secure payment of their wages.

It is ordered that copies of this judgment be served by mail upon the parties shown below.

At Lexington, Kentucky, July 19, 1976.

(s) Joe Lee
Honorable Joe Lee
Bankruptcy Judge

Copies to:

William S. Howard
Ruben G. Hicks
Elmer Morgan

APPENDIX 3-1

"The only decision, judgment, or decree issued by The Court of Appeals, other than the order denying rehearing is set out in Appendix 1 above."

APPENDIX 3-2

No. 83-5846/7

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

IN RE:
BECKNELL & CRACE COAL CO., INC., BANKRUPT

TONY SLOAN, ET AL., - - *Plaintiffs-Appellants,*

v.

RUBEN G. HICKS, TRUSTEE, - - *Defendant-Appellee*

ORDER—Filed July 11, 1985

BEFORE: JONES, Circuit Judge, WEICK and EDWARDS, Senior Circuit Judges.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

(s) John Hehman
John P. Hehman, Clerk

APPENDIX 4-1

1*

EXHIBIT #1

LEASE-PURCHASE AGREEMENT

THIS LEASE-PURCHASE AGREEMENT made and entered into this 22nd day of January, 1970, by and between LOLA GAY SLOAN, a widow, TONY SLOAN and his wife, LOLA BETTYE SLOAN, NED T. SLOAN and his wife, JIMMIE SLOAN, JOHN SLOAN and his wife, MARTARET SLOAN, and BRUCE R. SLOAN, a single man, parties of the first part, and BECKNELL AND CRACE COAL COMPANY, a Corporation, part of the second part:

WITNESSETH:

That for an in consideration of the sum of One Hundred Thousand ($100,000.00) Dollars, cash in hand paid, the receipt of which is hereby acknowledged, and in consideration of the covenants, agreements and stipulations, hereinafter contained to be performed and kept of the said party of the second part, the parties of the first part do hereby bargain, sell, transfer, convey and lease unto the said party of the second part, its successors and assigns, all the minable and merchantable coal in, under and/or upon Poplar and Short Mountains in Wayne and Clinton Counties, Kentucky, more particularly described as follows:

A. *Property in Clinton County*

Thirty-one (31) tracts conveyed on the 24th day of September, 1956, by Sloan Coal Co., Inc. to Bruce Sloan, recorded in the Clinton County, Kentucky, Court Clerk's Office in Deed Book 40, at page beginning on

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*These numbers are the page numbers of the original contract.

page 351; and the same being thirty one of the thirty-two tracts conveyed in said deed, the fourth tract of said deed being for a town lot sold by Bruce Sloan before his death. Said tracts aggregating approximately 2,130 acres as recited in said deed. On approximately sixty acres of the above thirty one tracts, the conveyances are for coal and coal mining rights only.

2

Six tracts of land conveyed to Bruce Sloan comprising 768 acres, more or less, that were conveyed to Bruce Sloan by E. P. Warinner et ux, and which is recorded in said Clerk's Office in Deed Book 27 at page 27, and by J. P. Harrison et ux, which is recorded in Deed Book 27, page 9.

Deeds from J. G. Huff et ux recorded in Deed Book 24, page 374 and from J. Perry Sloan et ux recorded in Deed Book 40 at page 286, and containing approximately 75 acres, in three tracts.

Deeds to three tracts from Arthur Patton et al. recorded in Deed Book 41, page 14 and for the same three tracts from M. H. Battson et al., by deed recorded in Deed Book 22, page 183, same being for all coal and other minerals on said three tracts, together with all necessary mining rights, on said three tracts of 100 acres, more or less, 43 acres more or less, and 6 acres, more or less.

Deed from Jas. A. Cross, M. C., recorded in Commissioner's Deed Book No. 3, page 363 for 50 acres, more or less.

Deed from G. A. Massengale, et al., recorded in Deed Book 30 at page 38 acres, more or less.

Deed from G. A. Massengale et ux, recorded in Deed Book 27, page 509.

Deed from Minnie Bertram et vir, recorded in Deed Book 60, page 363.

Deed from Esco Kennedy et ux, recorded in Deed Book 24, page 373.

Right of way deed from Robert Sidwell et ux, recorded in Deed Book 43, page 281.

Right of way deed from Omer L. Patton recorded in Deed Book 41, at page 55.

Deed from O. D. Guinn et ux for all coal, and mining and right of way rights, recorded in Deed Book 46, at page 329 and 330, to Lola Gay Sloan.

Deed from M. H. Sidwell et ux to Lola Gay Sloan, recorded in Deed Book ____, page ____.

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B. *Property in Wayne County*

Deed from Sloan Coal Company, Inc., dated 24th day of September, 1956, recorded in the office of the Clerk of the Wayne County Court in Deed Book 106, at page 382, to Bruce Sloan; 1st tract for 399¼ acres, with 54 acres excepted therefrom; 2nd tract: All coal and coal mining rights on 50 acres; 3rd tract: All coal and mineral rights on 11 acres.

Deed from Albany Coal Co., Inc., to Bruce Sloan, recorded in Deed Book 112, page 372, for coal and coal mining rights only.

Deed from James R. Guffey et ux to Bruce Sloan, recorded in Deed Book 92, page 566.

Deed from G. A. Massengale et ux to Bruce Sloan for all minerals and mining rights on 48 acres, and to another tract to surface of an unspecified number of acres.

Deed from Sloan Coal Company to Bruce Sloan to another tract, recorded in Deed Book 106, page 566. Deeds to all the coal and other minerals "on the mountain land" of a certain 212 acre tract of land, said deeds totaling approximately 5/8ths undivided interest of

same, and said deeds being from Hannah Sutton and Ester King and husband, recorded in Deed Book No. 121, at Page 582; from Johnnie Wright et ux, Welby R. Wright et ux and Ethel Hendricks, recorded in Deed Book 109, page 180, and deed from Letal Denney and affidavits of descent showing the various interest of grantors, recorded in Deed Book 109, page 180, Deed Book 109, page 178, and Deed Book 109, page 179: The ownership of the above is as tenants-in-common of the portion stated above.

Deed from John A. Sloan et ux, to Lola Gay Sloan for 75 acres, recorded in Deed Book 121, at page 622.

C. Together with all other coal properties owned by the party of the first part on Poplar and Short Mountains in the aforesaid counties, not hereinabove specifically described:

All of the aforesaid deeds that are noted as having been conveyed to Bruce Sloan, were later devised by the will of said Bruce Sloan to Lola Gay Sloan, which said will is of record in the Clinton County Clerk's Office in Will Book 3, at page 221.

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And the other parties of the first part, other than Lola Gay Sloan, having derived their title by deeds of conveyance from said Lola Gay Sloan, which are recorded in the Clinton County Court Clerk's Office in Deed Book 51 at pages No. 345-346; and in the Wayne County Court Clerk's Office in Deed Book 127, page 18.

And the said parties of the first part hereby further grant unto said party of the second part, its successors and/or assigns, the right and license to enter upon the premises hereinbefore described at all times, and to use so much of the surface thereof as may be reasonably neces-

sary in searching and exploring for coal and determining the thickness and depth of the coal and for the sinking of shafts and air shafts and for the deposit of waste material from said shafts; also the right and license to dig, mine and remove said coal therefrom by whatever means deemed practical by the party of the second part, including strip mining methods, deep mining method, or auger mining method, together with all and singular the rights privileges, licenses and easements necessary instant, or in any manner appertaining to the proper prosecution of the business of mining and removing said coal, and with respect to auger mining it is agreed that at approximately 1500 foot intervals, a 300 foot block of coal shall be left at a place to be mutually agreed upon by the parties, unless state or federal laws require said blocks to be left at closer intervals. Also the right-of-way for all necessary roads and railroads over and under said premises, and the right to use said roads and railroads and underground enteries and openings on said premises for the purpose of transportation of coal; and the right to occupy so much of the surface of said premises as may be reasonably necessary for the storing of

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said coal, and depositing the refuse therefrom, and the right to erect on said premises such buildings, structures and fixtures as may be necessary or instant to the proper prosecution of said business of coal mining.

Said party of the first part shall not be liable to the owners of adjacent properties for damages resulting from mining done by party of the second part; and party of the second part agrees to save first parties harmless in all events of said damages, if any. It is specifically understood and agreed that party of the second part shall not be liable for the destruction of timber so long as such destruction of timber is incident to ordinary mining oper-

ations. Party of the first part shall have thirty days advance notice to remove timber, on each and every "strip mining permit" granted by the proper governmental agency or agencies; unless said advance notice is specifically waived in writing by first parties or first parties' agent.

The One Hundred Thousand Dollars, ($100,000.00), paid as the consideration for the granting of this lease, shall be and become payment of the royalty for the next three hundred thousand tons of coal after the first two million seven hundred thousand tons shall have been mined and removed, but shall be and become said payment only when and if said next three hundred thousand tons after the first two million seven hundred thousand tons shall have been mined and removed.

Party of the second part agrees to enter upon the premises within 90 days from the date of this lease, and to commence operations for the mining of said coal from these premises, then, and in such case said party of the second part thereby agrees to pay to

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said parties of the first part as royalty the sum of thirty-three and one-third ($.33⅓) cents per ton for each ton of two thousand (2,000) pounds of coal mined and removed from said premises. During the production of the coal between two million seven hundred thousand tons through three million tons of coal mined and removed from said premises no royalty shall be paid by the party of the second part to parties of the first part, as the One Hundred Thousand Dollars, $(100,000.00) paid for this lease shall become payment in full for the tonnage mined from two million seven hundred thousand tons through three million tons; but said One Hundred Thousand Dollars, ($100,000.00), is not refundable or credited to the party of the second part under any other circumstances. *Upon the resumption of the mining and removal of coal in excess of three million tons,*

party of the second part shall have complete ownership and clear title to any coal remaining, and free rights to mine same. As it is part of this lease purchase agreement that upon receipt of One Million Dollars ($1,000,000.00), Nine Hundred Thousand Dollars, ($900,000.00), royalty and the initial One Hundred Thousand Dollars, ($100,000.00), payment, the first party grants complete ownership of the coal and coal mining rights to the second party.

Said party of the second part further agrees that during each year after the execution of this lease purchase agreement they shall mine not less than three hundred thousand, (300,000) tons of coal and remove same from said premises. If the party of the second part shall not mine and remove the agreed amount of coal.

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from said premises in either the first year or in the subsequent years it then will pay to parties of the first part a sum sufficient to guarantee to parties of the first part the receipt of royalty equal to the number of tons agreed to be mined per year at the rate hereinabove stipulated; which is the sum of One Hundred Thousand Dollars, ($100,000.00), provided however, that any amounts thus paid in any of the years of this lease, in excess of the royalty of coal actually mined shall be applied in payment of royalty for that subsequently mined and removed in any one year in excess of the minimum yearly amount hereinbefore provided for. The minimum royalty set out above is due each year, and if second party does not mine the minimum tonnage and pays the royalty on minimum tonnage, it is not entitled to credit on tonnage in excess of coal actually mined until the minimum tonnage has been mined each year. By way of reiteration and explanation, credit accumulated by second party in years where it failed to mine the minimum tonnage would only be applied in those years in which the tonnage should be in excess of the minimum tonnage for

such years. Further, it is hereby provided by agreement and contract between the parties, that if the second party should ever fail to mine coal sufficient to claim or take advantage of credit it shall have accumulated by paving minimum royalties in years in which it did not mine the minimum amount of coal provided for said years, or should it fail to mine and remove the tonnage from two million seven hundred thousand tons (2,700,000) to three million tons, (3,000,000) as has hereinbefore been described and provided; then said second party shall never have any other recourse for the obtaining credit

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of said sums; said sums being, (1) the consideration for first parties' execution of this instrument, and are hereby further (2) designated as liquidated damages to the first parties, due to them because of second party's failure to mine said quantities of coal.

All payments hereunder shall be made to lessors, the parties of the first part, their heirs, assigns, or agent at Albany, Kentucky, beginning with the commencement of mining and removal of coal from these premises as follows: All Coal mined and removed from the leased premises shall be paid for by the 20th day of the next month after the mining and removal of said coal.

Said party of the second part further agrees that all mining operations shall be conducted in a proper and workmanlike manner and that all minings on said premises shall be conducted in conformity to State and Federal regulations, and that no operation shall extend to a distance from any existing buildings on said premises so close as to make damage to said buildings iminent, without permission from parties of the first part to remove and destroy same.

Said party of the second part further agrees to keep accurate books, accounts, and records of all coal mined and removed from said premises, and that said accounts

shall be open to the inspection, viewing, reviewing, or auditing of said parties of the first part, their agent or agents at all reasonable times. Likewise, concerning a provision for the payment of "wheelage" by second party to first parties, which is hereinafter set forth and described, the second party will keep such records, which will

be available to first parties, as provided above concerning tonnages of coal mined and removed.

The party of the second part agree to hire an employee, who for the purpose of this instrument will be termed a "weightsman", and it will be the duty of said weightsman to keep accurate accounts of the coal mined and removed from these properties, as well as to keep accurate accounts of coal mined from other property by the second party and to which the first parties are entitled to "wheelage" fees if said coal is transported across first party's property; said "weightsman" will be selected by the first parties, and he will be paid a standard and reasonable salary by the second party; party of the second part will have the right to dismiss said "weightsman" if he fails to satisfactorily perform his duties, in which case parties of the first part shall have the right to select another "weightsman". Party of the second part are bound by the proper functioning of all of its employees to keep these tonnage records accurate, as is set forth in the paragraph immediately above; this provision for a "weightsman" being only to further facilitate and enhance the accurate keeping account of all tonnages for both parties herein. The continuation of the employment of the person herein designated as "weightsman" will be contingent upon the continuing approval of the parties of the first part; and should first parties desire to change the person designated as said "weightsman", then they shall do so by giving written notice to the second

party, which notice will designate the successor "weightsman.".

It is mutually agreed between the parties hereto:

(a) That if said second party shall discover that coal

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does not exist on said premises in sufficient quantities to justify the mining thereof or if, in his judgment, at any time the mining of said coal shall be or become unprofitable, or *if from any other cause said party of the second part in its discretion shall conclude to abandon the said premises, it is hereby given the right to do so by written notice thereof to said parties of the first part, and this Lease shall cease and terminate in thirty, (30) days after the giving of such notice, and both parties shall thereafter be released from all obligations hereunder; provided however,* said party of the second part shall remain liable for all royalties and monies due up to the time of such termination.

(b) The party of the second part covenants that it will diligently prosecute the mining operations hereunder throughout the life of this lease unless stopped by strikes, riots, acts of God, unfavorable market conditions, lack of transportation facilities, or other casualties or misfortunes beyond the control of said party of the second part.

(c) Parties of the first part covenant that they are lawfully seized of the property leased and described hereinabove, and that they have full power and right to lease the same to party of the second part, and that said estate is free from any and all encumbrances.

(d) It is specifically understood and agreed by and between the parties hereto that the party of the second part shall have the right to sublease or assign its rights herein, but that such sublease or assignee shall be subject to the same terms,

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(e) All of the covenants, provisions, and conditions of this agreement and lease shall inure to and be binding upon the heirs, successors, executors and administrators of the parties hereto, whether herein expressed or not.

(f) Upon the termination of this lease and agreement by exhaustion of the minable coal or otherwise, said party of the second part may remove from said premises all buildings, structures, fixtures, railroads, and other property placed in said premises by it or its assigns. Provided however, *if said party of the second part shall fail to pay any of the royalties or payments at the time and in the manner hereinabove provided, or shall fail to keep and perform any of the covenants and agreements on its part to be kept and performed hereunder, and shall continue in default and fail to remedy such breach for a period of thirty (30) days, after written notice thereof by parties of the first part, then this lease and agreement shall be null and void at the option of said parties of the first part. And it shall be lawful for said parties of the first part to enter on said premises and expell said party of the second part therefrom and again have and possess and enjoy same as if this agreement and lease had not been made.*

(g) The parties hereto agree that this lease in full will not be recorded in either the County Court Clerk's Office of Clinton or Wayne County, Kentucky, or made in full a public record, but that a mere "short form", or "memorandum" lease form, in lieu thereof, only sufficient in content to give legal notice

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that the property herein leased, for the mining of coal, has been so leased, together with the option purchase agreement for the purchase of said coal by second parties, without the naming or mentioning of the amounts to be mined or amounts of money to be paid, shall be recorded; and that

the full instrument shall remain in the private possession of the parties hereto, and the provisions hereof will remain the secret knowledge of the parties hereto only, both parties binding themselves to same. However, in the event the party of the second part should for any reason, record in full this instrument as a public record, it does hereby agree to pay all real estate taxes that thereafter may be assessed and charged the first parties, by any taxing authority, on the herein described real estate.

If the party of the second part transports coal mined on properties other than those included in the lease purchase agreement, and of which neither the coal nor the surface are owned by first parties; then the party of the second part shall pay to the parties of the first part the sum of five cents, (5¢) per ton, for each and every ton of such coal thus transported, as a "wheelage" fee to the parties of the first part, for the privilege of transporting said coal across the said property of the first parties, and these such fees are due and payable on the 20th day of the next month; the same as is herein provided for the payment of royalty for coal mined to the first parties. All monies thus paid for said "wheelage" by the party of the second part do not in any way apply as payment to the foregoing One Million Dollars, ($1,000,000.00), lease purchase agreement or to the thirty-three

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and one-third cents, (33⅓¢) per ton royalty due to the first parties, as these wheelage fees are separate and independent of the provisions of this agreement. Further, after the payment of the full One Million Dollars, $1,000,000.00) contemplated by this instrument, said wheelage fees will still be due and payable to first parties as aforesaid.

Party of the second part agrees to let the parties of the first part use all right-of-ways free of charge that it

may buy, lease, or otherwise acquire. In any event party of the second part or any of its successors, assigns, co-operators, joint-venturers, joint-enterprisers, cohorts or associates, whether separate persons, corporate entities or whatever, and whether specifically identified by proper or exact designation in this sentence or not; but which can hereafter be referred to as "associates, etc.": agree to convey and grant free of charge or expense, whatever right-of-ways and loading sites that it, or any of said "associates etc." may have acquired for the above said purpose: and second party agrees that all "associates etc." that may acquire said right-of-ways, will do so with the full knowledge and agreement of this provision to convey them to first parties upon the termination of this instrument, should said termination occur. Further, second party agrees also that if second party or any "associates etc.", shall acquire land or surface in fee, in the Poplar Mountain areas of Clinton and Wayne Counties or leading to either highways or Lake Cumberland, for the purpose of transporting of this and other coals, it or they will convey, upon such a termination, a permanent and convenient right-

of-way, of not less than sixty feet in width, over said land to the parties of the first part, likewise free of charge, before making other disposition of same. Also, as a further consideration of the execution of this instrument by first parties, the second party does hereby grant and convey unto the said parties of the first part a permanent right-of-way on lands recently acquired by it on Poplar Mountain, from Wendell Pyle and or family, better known as the Henry Foster farm, located in Clinton and Wayne Counties, and from the Cross family, which is located near said Henry Foster farm, in Clinton County, Kentucky, of a width of not less than sixty feet. Said right-of-way on these said two properties is to be the same as the one

used by the second party, so long as the second party is using a right-of-way across them; and upon a termination of said second party's use of a right-of-way across them, the same that second party had used, so long as same were still reasonably usable. Second party agrees in good faith to carry out the right-of-way and site covenants contained herein, and not to in any way resort to subterfuge or evasion of any kind to avoid the carrying out of this covenant.

When One Million Dollars, ($1,000,000.00), not including wheelage fees, has been paid to the party of the first part; party of the second part shall be and become owner in fee simple of all coal remaining on these premises. However, after a period of three years from the date hereof, party of the second part will pay any damages done to property in respect to any type development, or land restoration on said property, that is caused by mining coal.

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In Witness Whereof, witness the signatures of the parties of the first and second part the date and year first above written.

(s) Lola Gay Sloan
Lola Gay Sloan

(s) Tony Sloan
Tony Sloan

(s) Lola Bettye Sloan
Lola Bettye Sloan

(s) Ned T. Sloan
Ned T. Sloan

(s) Jimmie T. Sloan
Jimmie Sloan

(s) John A. Sloan
John Sloan

(s) Margaret Sloan
Margaret Sloan

(s) Bruce R. Sloan
Bruce R. Sloan

BECKNELL AND CRACE COAL COMPANY

By: (s) W. E. Becknell

ATTEST:

By: (s) Fred Strong

APPENDIX 4-2

1*

AGREEMENT

This is an agreement made between Lola Gay Sloan, a widow, John Sloan and his wife, Margarett Sloan, Bruce R. Sloan, a single man, Ned T. Sloan and his wife, Jimmie T. Sloan, and Tony Sloan and his wife, Lola Bettye Sloan, hereinafter referred to as the "Sloans" and the Becknell and Crace Coal Company, a Kentucky Corporation, hereinafter referred to as the "Company" or simply "Co".

WITNESSETH:

That whereas the Co. is the party of the second part and the Sloans are the party of the first part to one certain instrument, same being a coal mining lease, with a lease purchase provision in regard to the coal in the certain lands described in said instrument: and for all of the various provisions of said instrument, reference is hereby made: and whereas one of the provisions of the said instrument provides for the termination of same upon the Company's failure to pay royalties as therein set forth; and whereas the Sloans have exercised their option of termination of same because of the Company's failure to pay coal royalties for the months of April, May, and June, 1971, by duly giving the Company the required thirty days written

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notice of same, which, except for the execution of the present agreement, would have effected a termination of same on this day:

Now, therefore, in consideration of the premises, and the mutual covenants hereinafter set forth; made by each of

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*These numbers are the page numbers of the original contract.

the parties hereto, the Sloans do hereby agree to revoke, as of this day, the said termination, that would have otherwise taken effect today; said agreement hereby made, to the extent that same varies or deviates from said original instrument will only in said respect constitute amendment to same, but in all other aspects the said original instrument will stand and remain as before.

(1) The Co. hereby pays to the Sloans the sum of ten thousand dollars, ($10,000.00), as a partial payment upon the sum of twenty-eight thousand and fifty-two dollars and forty-three cents, ($28,052.43), which is the amount Co. owes them for royalties on coal mined during the months of April, May, and June, 1971. The receipt of a check for said sum of ten thousand dollars, ($10,000.00), is acknowledged by the Sloans upon the execution and delivery of this instrument.

(2) The Co. further agrees to pay another like sum of ten thousand dollars, ($10,000.00), on said royalties in arrears for said three months, by or before the 20th day of September, 1971.

(3) The Co. further agrees to pay the balance of said

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three month's royalties, of eight thousand and fifty-two dollars and forty-three cents, ($8,052.43) on or before the 20th day of October, 1971.

(4) The Co. further agrees to pay the coal royalties that will have become due for the month of July, 1971, by or before August 20th, 1971, the same as they are bound to do by the original instrument. But in the event of its failure to pay said July royalties by said August 20th, 1971 or its failure to pay any future royalties when due, an assignment in favor of the Sloans will be made by the Co. of the proceeds of all coal sales made by them to the East Ky. Rural Electric Cooperative, to the extent of thirty three and one third cents ($.33⅓) per ton of all coal sold by it

to said utility until all royalties and wheelage fees accrued since July 1st, 1971, have been paid in full. And this written agreement in such case, (of failure to pay royalties), will become and operate as such an assignment instrument, as per the provisions of this paragraph; and a copy of this instrument upon being duly certified as a true copy by the Sloans or their agent, together with a written statement by him or them that said royalties and/or wheelage fees have not been paid, will, when delivered to said East Ky. R.E.C.C. be recognized as such an assignment by these parties, and the Co. does hereby expressly authorize East Ky. R.E.C.C. to remit said sums directly to the Sloans. The Co. further agrees that it will not otherwise encumber the proceeds of the sale of said coal in any way that would conflict with this assignment in the event said assignment becomes operative.

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(5) In the event the company should fail to pay either of the deferred payments dealt with in paragraph numbered "2" above, of ten thousand dollars, ($10,000.00), due and payable by or before September 20th, 1971, or the deferred payment dealt with in paragraph numbered "3" above, of eight thousand and fifty-two dollars and forty-three cents, ($8,052.43), due by or before October 20th, 1971, *the Sloans may, at their option, declare an immediate termination of the entire lease-purchase agreement.*

(6) The Sloans also hereby agree that they will not demand payment on the 22 of September, 1971, (the present date due), of that certain promissory note in the amount of forty thousand dollars ($40,000.00), executed on the 21st date of January, 1971, by the Co. and also signed and personally guaranteed by Dr. W. E. Becknell, Dr. James L. Becknell, and Fred Strong; but will in the event that the two deferred payments mentioned in paragraphs numbered "2" and "3" are paid as provided for herein, grant the company and the three aforementioned personal guarantors

until the 22 of March, 1972 to pay said note and interest. The parties agree that this agreement of the Sloans not to demand payment until said date will be made known to said three guarantors, and same will not in any way affect the personal liability of said three individuals; and it being also agreed that the Company or any of said individuals may pay said note and interest at a date earlier than March 22, 1972. Provided, however, that should the Company fail to make either of the deferred pay-

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ments as provided in the paragraphs numbered "2" and "3" herein, on September 20th, 1971, and October 20th, 1971 respectively; then the Sloans shall not be bound by the provision herein of not so demanding payment of said note until March 22, 1972; but may, at their option, demand full payment of said promissory note, in the event of Company's failure to make said deferred payments as aforesaid.

In testimony whereof, witness the signatures of the Sloans and of the Company, by its duly authorized agents on this the Second day of Aug. 1971.

Becknell and Crace Coal Company

(s) W. E. Becknell
Pres.

(s) James T. Jones
Vice Pres. & Gen. Mgr.

(s) Ned T. Sloan

(s) Jimmie T. Sloan

(s) Tony Sloan

(s) Lola Bettye Sloan

(s) Lola Gay Sloan
By T. Sloan, Power of Attorney

(s) John Sloan
By T. Sloan, Power of Attorney

(s) Margarett Sloan
By T. Sloan, Power of Attorney

(s) Bruce R. Sloan
By T. Sloan, Power of Attorney

APPENDIX 4-3

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
LONDON

No. 72-650

IN THE MATTER OF:

BECKNELL AND CRACE COAL COMPANY - *Bankrupt*

In Bankruptcy

TRANSCRIPT OF HEARING—Filed April 12, 1974

HONORABLE JOE LEE, presiding.

The testimony in the above entitled matter was taken by BETTY FRANCES CANTRELL, Notary Public in and for the State of Kentucky at large, on Friday, June 15, 1973, commencing at the approximate hour of 1:30 P.M.

Appearances:

William S. Howard
Howard and Howard
171 N. Upper
Lexington, Kentucky
Attorney for Trustee

Ruben G. Hicks
P. O. Box 212
Whitley City, Kentucky
Trustee in Bankruptcy

Elmer Morgan
521 W. Market Street
Louisville, Kentucky
Attorney for Sloans, Et Al.

Tony Sloan
Albany, Kentucky 42682
(In person)

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Robert Rawlins
500 Central Bank Bldg.
Lexington, Kentucky
Attorney for Becknell

Lyle G. Robey
Stoll, Keenon and Park
310 First National Bank Bldg.
Lexington, Kentucky
Attorneys for C & S Capital—Atlanta

W. E. Becknell
(In person)

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The witness, DR. W. E. BECKNELL, being first duly sworn upon his oath, was questioned and testified as follows:

* * * * * * *

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Cross-examination by Mr. Morgan

X. 1. Dr. Becknell, as I understand your testimony Becknell-Crace Coal Company mined about one-fourth of the coal they were supposed to mine under this contract?

A. What — you got to put a time on it.

X. 2. Well, in terms and time both you were in there about two years — two and a half or three years and I believe you paid about $200,000.00 total for the coal, then you ceased operations, is that correct?

A. I can't say that that is exactly right.

X. 3. Approximately?

A. Be approximately.

X. 4. The greater majority of the contract remains to be performed in the future?

A. You mean the coal contract?

X. 5. Yes, sir?

A. Yes, sir.

X. 6. That it remains to be performed on the part of Becknell-Crace Company in getting the coal out; remains to be performed in selling it, weighing it paying for it and all the other items that have to go into the contract?

A. That's right.

X. 7. And the major portion of the consideration remains to be paid, is that correct?

A. What do you mean?

X. 8. The major portion of the consideration for the entire coal mining lease remains to be paid to Sloans if the coal is removed?

A. That is right.

* * * * * * *

APPENDIX 4-4

ARTICLE 1 § 1 U.S. CONSTITUTION

§ 1.—All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

ARTICLE 1 § 8 CLAUSE 4 OF CONSTITUTION OF U.S.

§ 8.—The congress shall have power . . . .

[4.] To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

AMENDMENT 5 TO CONSTITUTION OF U.S.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

11 USC § 110b. Title to property

* * * * * * * *

(b) The trustee shall assume or reject an executory contract, including an unexpired lease of real property, within sixty days after the adjudication or within thirty days after the qualification of the trustee, whichever is later, but the court may for cause shown extend or reduce the time. Any such contract or lease not assumed or rejected within that time shall be deemed to be rejected. If a trustee is not appointed, any such contract or lease shall be deemed to be rejected within thirty days after the date of the order directing that a trustee be not appointed. A trustee shall file, within sixty days after adjudication or within thirty days after he has qualified, whichever is later, unless the court for cause shown extends or reduces the time, a statement under oath showing which, if any, of the contracts of the bankrupt are executory in whole or in part, including unexpired lease of real property, and which, if any, have been rejected by the trustee. Unless a lease of real property expressly otherwise provides, a rejection of the lease or of any covenant therein by the trustee of the lessor does not deprive the lessee of his estate. A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same is enforcible.[1] A trustee who elects to assume a contract or lease of the bankrupt and who subsequently, with the approval of the court and upon such terms and conditions as the court may fix after hearing upon notice to the other party to the contract or lease,

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[1]So in original. Probably should read "enforceable".

assigns the contract or lease to a third person, is not liable for breaches occurring after the assignment.

* * * * * * *

11 USC § 365(d)(1)

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

TITLE 11, APPENDIX—BANKRUPTCY RULES

Rule 607. Assumption, Rejection, and Assignment of Executory Contracts

Within 30 days after the qualification of the trustee, unless the court for cause shown extends or reduces the time, the trustee shall file a statement showing any executory contracts of the bankrupt, including unexpired leases, which the trustee has assumed. Whenever practicable, the trustee shall obtain approval of the court before he assumes a contract. Any such contract not assumed within 60 days after qualification of the trustee, or within such further or reduced time as the court may allow within such 60-day period, shall be deemed to be rejected. If a trustee does not qualify, any such contract shall be deemed to be rejected at the expiration of 60 days after the date of an order directing that a trustee be not appointed, or at such earlier or later time as the court may fix within such 60-day period. On application by the trustee for authority to assign any contract he has assumed pursuant to this rule, the court shall determine the matter after hearing on notice to the other party to the contract.

Rule 906. Time

(a) Computation. In computing any period of time in a bankruptcy case Rule 6(a) of the Federal Rules of Civil Procedure applies.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without application or notice order the period enlarged if request therefor is made before the expiration of the

period originally prescribed or as extended by a previous order or (2) upon application made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 107(b)(2), 115(b)(4) insofar as it makes Rule 50(b) of the Federal Rules of Civil Procedure applicable in bankruptcy cases, 302(e), 403(c), 607, 752(b), 802, 923, and 924, except to the extent and under the conditions stated in them.

(c) Reduction. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may in its discretion with or without application or notice order the period shortened; but it may not reduce the time for taking any action under Rules 203(a), 204(a)(1), 302(e), 404(a) and (b), 409(a)(2), and 802, except to the extent and under the conditions stated in them.

(d) For Motions—Affidavits. Rule 6(d) of the Federal Rules of Civil Procedure applies in bankrutcy cases, except that the reference to Rule 59(c) shall be read as a reference to Bankrutcy Rule 923.

(e) Time of Service or Notice by Mail. Service or notice by mail is complete upon mailing.

APPENDIX 4-5

SCHEDULE B.—STATEMENT OF ALL PROPERTY OF BANKRUPT

Schedule B-1—Real Estate
(filed June 16, 1972)

Location and Description of all real estate owned by Debtor, or held by him, whether under deed, lease or contract	Incumbrances thereon, if any, and dates thereof	Statement of particulars relating thereto	Estimated Value of debtor's interest $ Cts.
* * * *			
Lola Gay Sloan John Sloan Margarette Sloan Bruce R. Sloan Ned T. Stone Tony Sloan Lola Bettye Sloan c/o Tony Sloan Grider Hill Dock Albany, Kentucky 42602	Lease of mineral rights on approximately 3000 acres in Wayne and Clinton Counties, located at Poplar and Short Mountains	Contingent Balance due 600,000	Estimated value of reserves 4,500,000.00

APPENDIX 4-6

STATEMENT OF EXECUTORY CONTRACTS PURSUANT TO PROVISIONS OF CHAPTER XI OF THE ACTS OF CONGRESS RELATING TO BANKRUPTCY
(filed June 16, 1972)

Lola Gay Sloan John Sloan Margarette Sloan Bruce R. Sloan Ned T. Sloan Jimmie T. Sloan Tony Sloan Lola Bettye Sloan c/o Tony Sloan Grider Hill Dock Albany, Kentucky 42602	Lease of Mineral Rights on approximately 3000 acres in Wayne and Clinton Counties, located at Poplar and Short Mountains; contingent balance due $600,000	Estimated value of reserves $4,500,000.00

APPENDIX 4-7

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
LONDON

No. 72-650

IN THE MATTER OF: BECKNELL AND CRACE COAL CO. *Debtor*	**In Proceedings for an Arrangement Under Chapter XI**

PETITION TO DIRECT REJECTION OF EXECUTORY CONTRACT (LEASE PURCHASE AGREEMENT) AND TO DIRECT DEBTOR TO SURRENDER POSSESSION OF PREMISES—Filed August 21, 1972

TO THE HONORABLE JOE LEE, REFEREE IN BANKRUPTCY:

The petition of Lola Gay Sloan, Tony Sloan, Lola Bettye Sloan, Ned T. Sloan, Jimmie Sloan, John Sloan, Margaret Sloan, and Bruce R. Sloan, respectfully represents:

1. Petitioners are the owners in fee of premises situated in Clinton and Wayne Counties, Kentucky, known generally as Poplar and Short Mountains, and more particularly described in the Lease Contract which is filed herewith, made a part hereof, as if set out fully herein, marked Petitioners' Exhibit "A".

2. By Lease dated the 22nd of January, 1970, petitioners, as Lessors, leased to Becknell and Crace Coal Company, all the minable and merchantable coal in, under, or on the aforesaid premises.

3. Said Lease provides that upon abandonment or termination thereof, Lessee will reconvey to Petitioners all rights-of-way, easements, and fee simple or other interest acquired in or on said mountains by virtue of the operations contemplated under said Lease; that most of said easements, rights-of-way, and premises so acquired by Lessee-Debtor, have been reconveyed to Petitioners, leaving only a small number of said tracts to be reconveyed.

4. Petitioners have declared said lease contract to be terminated, and considers said contract abandoned and terminated by debtor; that Lessee-Debtor appears to have abandoned said coal mining operation since no mining operations have been carried on there for several months and since most of Lessee-Debtor mining equipment has been repossessed or sold, and since Lessee-Debtor is in default in payments under the terms of said lease prior to abandoning said operation.

5. On or about the 18th day of May, 1972, said Debtor-Lessee filed a petition herein proposing an arrangement under Chapter XI of the Bankruptcy Act; that on or about June 19, 1972 its statement of affairs, schedules, and statements of executory contracts, including that of your petitioners, were filed herein.

6. Becknell and Crace Coal Company, debtor in possession herein, has appeared in this action by its attorney, Fred Goldberg, Goldberg and Lloyd, Commonwealth Building, Louisville, Kentucky, and no receiver or trustee has been appointed herein, and no plan has been offered or confirmed herein.

WHEREFORE: Petitioners pray that this Court enter an order rejecting the executory contract, its lease purchase agreement filed herewith, and that the debtor in possession be directed to remove the remainder of its personal property, if any, from the premises, and deliver possession of same to your petitioners, and that debtor in possession and

lessee under the lease be directed to convey or reconvey such easements, rights-of-way, fee simple, or other interest that it may have in the property which is the subject of said executory contract.

Dated this 18th day of August, 1972.

Mapother and Morgan, Attys.

By: Elmer Morgan
Attys. for Petitioners
521 West Market St.
Louisville, Ky. 40202
589-2780

APPENDIX 4-8

TRUSTEE'S ANSWER TO PETITION TO DIRECT REJECTION OF EXECUTORY CONTRACT AND TO DIRECT DEBTOR TO SURRENDER POSSESSION OF PREMISES OF SLOAN—Filed November 3, 1972

To The Honorable Joe Lee, Referee In Bankruptcy:

Comes Ruben G. Hicks, Trustee herein, by counsel, and for his Answer to the Petition to Direct Rejection of Executory Contract (Lease Purchase Agreement), and to Direct Debtor to Surrender Possession of Premises of Sloan, filed herein on August 21, 1972, respectfully represents as follows:

1. That the Trustee herein denies the allegations contained in Paragraphs 1 and 4 of the said Petition.

2. That the Trustee herein denies the allegations contained in Paragraph 2 of the said Petition, in that the said Petition alleges that the instrument executed was a Lease.

3. That the Trustee is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3 of the said Petition and therefore denies same.

4. That the Trustee admits the allegations contained in Paragraph 5 of said Petition.

5. That Paragraph 6 of the said Petition appears to the Trustee to have been accurate as of the time the said Petition was filed but is no longer applicable.

6. That the instrument dated the 22nd day of January, 1970, and signed by the Petitioner conveyed to the bankrupt a fee simple title to the within described property, subject to a lien reserved for the payment of the balance of the purchase price.

7. That the bankrupt estate does have an equitable interest in the aforesaid property described in the said

Petition and that the Trustee should be allowed to liquidate the said property.

8. That certain claims for wages herein, pursuant to KRS 376.150 and 376.160, are superior to the claim of Petitioner and that in order to administer the estate in accordance with the laws of the Commonwealth of Kentucky and the laws of the United States, it is necessary for the Trustee to liquidate the said property to pay the aforesaid wage claims.

WHEREFORE, your Trustee prays that the said Petition be denied with costs, that he, as Trustee, be adjudged the owner in fee simple of the said real estate subject to a lien in favor of the Petitioner for the balance of the purchase price, that he be permitted to sell the aforesaid real property and apply the proceeds in satisfaction of the aforesaid wage claims and the claims of other creditors herein and administrative expenses, and for such other relief as is just.

(s) William S. Howard
William S. Howard, Attorney
for Ruben G. Hicks, Trustee
171 North Upper Street
Lexington, Kentucky 40507
Telephone: 606/254-3302

(2)

85-600

Supreme Court, U.S.
FILED
NOV 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

In Re:

BECKNELL & CRACE COAL CO., INC., BANKRUPT

LOLA GAY SLOAN, TONY SLOAN, LOLA BETTYE SLOAN, NED T. SLOAN, JIMMIE SLOAN, JOHN SLOAN, MARGARET SLOAN and BRUCE R. SLOAN - - - Petitioners

versus

RUBEN G. HICKS, TRUSTEE IN BANKRUPTCY OF BECKNELL & CRACE COAL COMPANY, INC., BANKRUPT - - Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT, RUBEN G. HICKS, TRUSTEE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

By: WILLIAM S. HOWARD
ODELL & HOWARD
171 North Upper Street
Lexington, Kentucky 40507
(606) 254-3302
Attorneys for Respondent

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

BEST AVAILABLE COPY

23 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Sixth Circuit erred in affirming the decisions of the United States District Court for the Eastern District of Kentucky and the United States Bankruptcy Court for the Eastern District of Kentucky, holding that the Lease-Purchase Agreement granted the Bankrupt, Becknell & Crace Coal Co., Inc., a fee simple interest in coal.

2. Whether the Court of Appeals erred in remanding to the Bankruptcy Court Trustee's motion for an extension of time to reject or assume the executory portion of the Agreement, where the Bankruptcy Court had previously held the Agreement to be non-executory and the question to be moot, and so not allowing Trustee to accept or reject.

3. Whether the supervisory power of the Supreme Court should be exercised where the decision of the Sixth Circuit has not departed from the decisions of this Court, other Federal Courts and the law of Kentucky defining a fee simple title to coal nor is there a denial of a constitutional right or important question of Federal law involved in the decision of the Sixth Circuit.

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No. 85-600

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

IN RE:
BECKNELL & CRACE COAL CO., INC., BANKRUPT

LOLA GAY SLOAN, Et Al. - - - *Petitioners*

v.

RUBEN G. HICKS, TRUSTEE - - *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF RESPONDENT, RUBEN G. HICKS, TRUSTEE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Respondent, Ruben G. Hicks, Trustee in Bankruptcy of Becknell & Crace Coal Co., Inc. (hereinafter referred to as "Trustee") contends that the criteria governing certiorari policy observed by the Supreme Court indicates that the Petition for Writ of Certiorari filed herein should be denied.

STATEMENT OF THE CASE

The Trustee deems it necessary to add the following information to the Petitioners' statement of the case pursuant to Supreme Court Rule 34.2.

On August 21, 1972, Sloans filed, in the Bankruptcy Proceeding of the Bankrupt, Becknell & Crace Coal Co., Inc., a petition to direct rejection of the Lease-Purchase Agreement as an executory contract. Subsequently, Ruben G. Hicks was appointed as Trustee of the estate and an Answer was filed to the Sloan petition asserting a fee ownership to the coal in question. As a precaution, and in case the Court disagreed with the Trustee's interpretation of the document as giving the Bankrupt, and hence the Trustee, a fee simple interest in the coal in question, the Trustee also timely filed an application for an extension of time to reject or assume the document as an executory contract in case it should be so construed. As stated in the application, Trustee believed the Lease-Purchase Agreement conveyed to the Bankrupt a fee simple interest to the coal and that the Lease-Purchase Agreement was not executory within the meaning of 11 U.S.C. Section 110(b). Trustee stated "that unless the above controversy is determined by this Court, the Trustee will be unable to determine the necessity for acceptance or rejection of any such Executory Contract, if any such a contract exists." Trustee's application is set out verbatim in the appendix hereto. (Respondent's Appendix pp. 17-18)

The filing of the application for extension of time proved unnecessary since the Bankruptcy Court agreed with the Trustee's primary contention that the Trustee held a fee interest in the coal and found that the Lease-Purchase Agreement was not the kind of contract which the Trustee must be deemed to have rejected if he does not assume it within the time limits fixed by

section 70(b) of the Bankruptcy Act, 11 U.S.C. Section 110(b). (Petitioners' Appendix p. 21a). Therefore, the Bankruptcy Court ruled that the Trustee's application to extend the time to assume or reject the contract, if executory, was moot. (Petitioners' Appendix p. 34a).

REASONS FOR DENYING WRIT OF CERTIORARI

I. The Decision of the Court of Appeals Is Not in Conflict With the Decision of Any Court.

Supreme Court Rule 17 provides that a review of a petition for a writ of certiorari is not a matter of right, but of judicial discretion and will only be granted when there are special or controlling reasons therefore. The Rule cites as examples, neither controlling nor fully measuring, instances where there is conflict between the decision sought to be reviewed and a decision of the same subject matter by another Federal Appeals Court or State Court of last resort. Here, there is no such conflict.

In arriving at its decisions, the Bankruptcy Court, the United States District Court for the Eastern District of Kentucky and the United States Court of Appeals, Sixth Circuit, reviewed the character of the Lease-Purchase Agreement and supplemental agreements thereto. In so doing, the peculiar character of mining property, in that its value depends on its production, was considered. Since the agreement in question purports to affect title to land within Kentucky, the law of Kentucky should be applied. *Belcher* v. *Elliott,* 312 F. 2d 245 (6th Cir. 1963). Under Kentucky

law, a lease of minerals underlying the surface is a depletion lease, and is treated as a sale of real estate. See *Walker* v. *Felmont Oil Corp.,* 136 F. Supp. 584, vacated 240 F. 2d 912 (W.D. Ky. 1956).

As stated by the Bankruptcy Court in its Memorandum Opinion (Petitioners' Appendix p. 27a), "(t)o a great many people who do not live in coal counties, an instrument having the usual terms and attributes of a lease, would seem to be a lease. Nevertheless, there is a substantial body of law to the effect that the grant of the right to mine coal in the lands of the Lessor, and to remove the coal therefrom, although the instrument may be called a 'lease,' is a grant of an interest in the land itself, and not a mere license to take coal. *School Dist., Etc.* v. *City of Philadelphia,* 79 A. 2d 433, 436."

In support of its holding that the Lease-Purchase Agreement was a sale of the coal interest in fee simple, the Bankruptcy Court found the case to be analogous to *Ramsey* v. *Yunker,* 311 Ky. 820, 226 S. W. 2d 14 (1950). In the *Ramsey* case, the Kentucky Court of Appeals held the instrument in question granted to the party of the second part ". . . all of the oils and gases and all rights thereto . . . in, upon or over or hereafter found in, upon or under the herein described tracts or parcels of land . . . with the exclusive right to enter upon the lands for the sole purpose of operating for, producing, storing and marketing oil, gas and gasoline . . ." The Court held the instrument was a deed to the oil and gas in place because it had all the earmarks of an outright conveyance.

It is well settled that a conveyance may separate minerals and surface into independent legal estates, and mineral estates so created may be dealt with as any other fee interest in land. *Peabody Co.* v. *Pasco,* 452 F. 2d 1126 (6th Cir. 1971); *Commerce Union Bank* v. *Kinkade,* Ky., 540 S. W. 2d 861 (1976); *Kincaid* v. *McGowan,* 88 Ky. 91, 4 S. W. 802 (1886).

This is especially true for purposes of taxation. In *Wolf County* v. *Beckett,* 127 Ky. 252, 105 S. W. 447 (1907), the Court observed that an oil and gas lease

> ". . . carries with it not only the privilege of going upon the lands for that purpose, but the right to take therefrom during the continuance of the lease such oil or gas as may be found. The title to the oil or gas is vested by the lease in the lessee. It is his property of recognized value. He controls it and disposes of it as his own. Not only is the oil or gas property, but the lease under which it is taken from the ground is property which has substantial value and is the subject of frequent sale . . .
>
> "It is contended, however, that the oil in situ, being part of the realty, cannot be severed therefrom except by deed. It is admitted the leases held by the appellees are of the usual kind. They give the appellees the right to drill and operate for oil and gas for a definite term of years, and, in case oil or gas is found in paying quantities, to continue said operations so long as same is found in quantities that pay. Appellees agree on their part to deliver one-eighth of all oil found by reason of such operations in suitable pipe lines to the owner of the fee, the lessor, and to pay a fixed sum per year for

> each well the product of which is carried and marketed from the premises. The remainder of the oil or gas is the property of the lessees. Why, then, say that a deed is necessary to sever the oil from the realty, when the lease accomplishes the same result? . . . We therefore conclude that the form of contract is immaterial and that it makes no difference whether the oil or gas privileges be conveyed by deed or lease, just so the effect of the instrument is to vest in the lessee all property rights to the oil or gas that may be found in paying quantities on the leased premises." *Id.* at 448.

In support of its judgment affirming the opinion of the District Court in part, the Court of Appeals relied upon the principal upheld in its recent opinion in *Godley* v. *Kentucky Resources Corp.,* 640 F. 2d 831, 835 (6th Cir. 1981). Under this opinion, an unambiguous instrument conveying property, or specified property rights, must be construed according to its terms, not according to the creator's intent, and is in and of itself generally determinative in nature and extent of the conveyance. Regardless of the Lease-Purchase Agreement's denomination and hybrid characteristics, under Kentucky law "what is commonly termed a coal mining lease is regarded as the conveyance of an estate or interest in the minerals as land unless the terms of the instrument require a different construction." *Johnson* v. *Coleman,* 288 S. W. 2d 348, 349 (Ky. 1956).

The operable terms of the Lease-Purchase Agreement support the Court's conclusion that the Bankrupt, and hence the Trustee, was granted a fee simple interest in the coal underlying the land. While desig-

nated a "Lease-Purchase Agreement," by its very terms, the Agreement contains words of present demise of all the coal in place to the Bankrupt, together with the right and license to enter upon the premises to remove the coal and to occupy so much of the surface of the premises as may be reasonably necessary for that purpose. The Agreement specifically provides that the Sloans "do hereby bargain, sell, transfer, convey and lease unto the party of the second part, its successors, and assigns, all the minerals and merchantable coal, in, under and/or upon Poplar and Short Mountains in Wayne and Clinton Counties, Kentucky, more particularly described as follows . . ." (Petitioners' Appendix p. 38a).

When a document recites the words ". . . bargain, sell, transfer, convey . . ." in connection with minerals in place and words of inheritance follow, it is presumed that the parties intended them to have their ordinary legal effect, which is to vest in the grantee the entire ownership of the minerals mentioned in the land described. *Kentucky Natural Gas Corp.* v. *Carter,* 303 Ky. 559, 198 S. W. 2d 311 (1946); *Duncan* v. *Mason,* 239 Ky. 570, 39 S. W. 2d 1006 (1931). Further, the use of the terms ". . . lease, grant, convey and confirm . . ." have been held to convey a fee to the coal in place. *Johnson* v. *Pittsburg Consolidation Coal Co.,* Ky., 311 S. W. 2d 537 (1958).

The Lease-Purchase Agreement further gives the Bankrupt ". . . the right and license to enter upon the premises hereinbefore described at all times, and to use so much of the surface thereof as may be reasonably

necessary in searching and exploring for coal." (Petitioners' Appendix p. 41a).

The fact that a substantial down payment is paid by the Bankrupt is also indicative of a transfer of a fee and not a lease. See *Trinity Temple Charities* v. *City of Louisville,* 300 Ky. 172, 188 S. W. 2d 91 (1945) wherein the Court held that the document denominated a lease really gave a fee title to the grantee. The position that a substantial down payment indicates a transfer of title to the coal rather than a lease is also supported by *Kentucky Natural Gas Corp.* v. *Carter,* 303 Ky. 559, 198 S. W. 2d 311 (1947) and *Duncan* v. *Mason,* 239 Ky. 570, 39 S. W. 2d 1006 (1931).

The Agreement in question provided for a total payment of $1,000,000.00 in the form of the initial down payment of $100,000.00 and $900,000.00 by means of royalty on tonnage mined. The payment of a designated number per ton of mineral removed does not make the instrument a lease instead of a deed. *Duncan v. Mason,* 3 S. W. 2d 1006 (Ky. 1931). In this case, after the payment of $1,000,000.00, the Agreement provided that the first party (Sloans) "grants complete ownership of the coal and coal mining rights to the second party" (Bankrupt). (Petitioners' Appendix p. 44a). In essence, the intent within the Lease-Purchase Agreement is to sell all of the coal in place to the Bankrupt for the total sum of $1,000,000.00.

If the Agreement confers upon the vendee (1) the exclusive right to extract the coal, (2) the right to all the coal, that is the right to mine the coal to exhaustion, and (3) requires the vendee to pay a minimum royalty,

that is to pay for the coal even though it is not mined, then the Agreement is a sale of the coal in place. *Hummel* v. *McFadden,* 150 A. 2d 856 (1959).

The Agreement involved in the present case meets all these criteria. Therefore, the finding of the Court of Appeals that the Bankrupt has fee simple title to the unmined coal underlying the Sloan properties is correct and is consistent with the overwhelming case law of Kentucky.

II. The Decision of the Court of Appeals Did Not Depart From Accepted and Usual Judicial Proceedings and There Is Otherwise No Special or Important Reason for Granting the Writ.

In its construction of the terms of the Lease-Purchase Agreement, the Court of Appeals affirmed the holding of the lower court by its determination that the Agreement granted the Bankrupt a fee simple interest in the underlying coal. The Court of Appeals reversed on the question of the executory contract stating that all parties had obligations to perform in the future. The Petitioners state that such a holding is illogical, incompatible and incomplete. They argue, incorrectly, that the Sixth Circuit failed to state, completely, what interest the Trustee now has. In fact, the opinion states that fee simple interest to the coal in place was conveyed to the Bankrupt and thus, pursuant to Bankruptcy Act section 70a(5) (11 U.S.C. 110(a)(5)) reviewed hereinafter, the Trustee would hold a fee simple estate. In view of the fact that the Court of Appeals felt that all parties had obligations to perform in the future and as a result, those portions of the Lease-

Purchase Agreement were executory, the Court held that the Trustee should be given the opportunity to assume or reject the contract. The Lease-Purchase Agreement provides for additional obligations and duties arising out of the grantor's continued ownership of the surface rights. It could only be these obligations that were to be performed in the future that the Sixth Circuit held to be executory. This is a consistent and compatible view of the decision of the Court of Appeals.

In an attempt to create arguments for review by this Court, Petitioners argue that the Court of Appeals has granted to the Bankrupt, and hence the Trustee, a much greater interest than is permissible under the Bankruptcy Act. This statement is entirely incorrect. The Court of Appeals determined that the Bankrupt was granted a fee simple interest in the coal under the terms of the Lease-Purchase Agreement.

Stated broadly, the general rule is that the bankruptcy trustee takes title to all the property of the bankrupt enumerated in section 70a of the Bankruptcy Act (11 U.S.C. section 110), whether such property is in possession or in action, as determined at the time the petition is filed but excepting such property as may be held as exempt. Under section 70a(5) the trustee of the estate of a bankrupt, upon his appointment and qualifications, is vested by operation of law with the title of the bankrupt as of the date of filing, excluding exempt property, all . . ."(5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might

have been levied upon and sold by judicial process against him or otherwise seized, impounded, or sequestered . . ."

Section 70a(5) is extremely broad and searching, and has been drawn to comprise all property that the bankrupt may have that may be of use or benefit to him. See 4A *Collier on Bankruptcy,* Paragraph 70.15 (1), pp.135-137 (14th ed. 1978) for a general discussion of paragraph 5 of section 70a reflecting that this clause is obviously the most comprehensive of all clauses dealing with title to bankrupt's property. It includes every vested right and interest growing out of property that can properly be the subject of lawful transfer, levy or seizure. It certainly includes the fee simple interest in the coal held by the Bankrupt herein which is capable of being transferred or assigned under the explicit terms of the Lease-Purchase Agreement itself and could have been levied upon.

The issue from the beginning has been the construction of the rights granted to the Bankrupt under the Lease-Purchase Agreement. Upon determination that these rights were fee simple interest in the coal, this fee simple interest vested in the Trustee under section 70a(5). To suggest that the Trustee received more than the Bankrupt was granted within the terms of the Lease-Purchase Agreement or that the Trustee received a windfall is unjustified.

III. The Court of Appeals Violated Neither Statute Nor the United States Constitution.

The Petitioners argue that the Court of Appeals violated the Fifth Amendment by altering the terms of their Agreement and depriving them of their property without due process. What the Court did was to take the terms of the Agreement and, applying Kentucky law, determine the language to convey a fee simple absolute interest in the coal underlying the Sloans' property. The Court did not change the contract, or alter the rights of the parties; the rights and interests of the parties were established by the contract as written by the Petitioners and set at the time of the Agreement. Nor did the Court violate the provisions of Rule 607 of the Bankruptcy Act. Trustee could neither consistently assume or reject the Lease-Purchase Agreement which he believed to be non-executory in all its aspects.

Trustee believed that the only thing that remained executory about the Agreement was the Bankrupt's obligation to pay. As such, Trustee relied on case law which determined the Agreement was not the kind of contract which a trustee must assume or reject within the time limits fixed by section 70(b) of the Bankruptcy Act, 11 U.S.C. Section 110(b). *Stell Manufacturing Co.* v. *Gilbert,* 372 F. 2d 113, 115 (5th Cir. 1967); *In Re Kostling,* 350 F. Supp. 1071 (D.C. Conn. 1972); *Lam* v. *White,* 204 Ky. 557, 264 S. W. 1113 (1924). An application was filed within the statutory time period to enlarge the time to assume or reject in the

event that the Agreement was held to be executory. Since the Bankruptcy Court and later the District Court held the Agreement to be non-executory in its entirety, the Trustee could not have consistently assumed or rejected and the application to extend was deemed unnecessary. When the Court of Appeals reversed in part and held a portion of the Agreement to be executory, it correctly noted that the Trustee had never been given an opportunity to assume or reject, and so remanded.

The Petitioners have cited the case of *Bank of Marin* v. *England,* 385 U. S. 99, 17 L. Ed. 2d 197, 87 S. Ct. 274 (1966), which stated that "there is an overriding consideration that equitable principles govern the exercise of Bankruptcy jurisdiction." The Petitioners have used this citation in their argument that nothing would be more inequitable than to take away the property of the Sloans, and transfer it to the Trustee, for the benefit of creditors of the Bankrupt. Obviously, the Court has not taken away or deprived the Sloans of their property. The Lease-Purchase Agreement construed by the Court in applying Kentucky law conveyed to the Bankrupt a fee simple absolute interest in the underlying coal of the Sloans' properties. In view of the fact that the Court of Appeals has determined that portions of the Lease-Purchase Agreement are executory and that the Trustee should be given the opportunity to assume or reject, nothing would be more inequitable than to not allow the Trustee to now have the opportunity to assume or reject the Lease-Purchase

Agreement in order to benefit the creditors of the Bankrupt.

IV. The Petition Presents No Important Issue of Federal Law That Should Be Decided by the Supreme Court.

It should be noted that the action below was governed by the Bankruptcy Act, the law preceding the Bankruptcy Code of 1978. Since the Act applies only to those cases filed prior to 1978, its application is not an important question of federal law. The issue of its application does not merit consideration by the Supreme Court. Neither would the review of the Court of Appeals construction of contractual terms merit the granting of review by this Court.

CONCLUSION

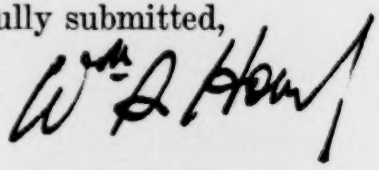
The Petition for Writ of Certiorari should be denied for the reasons set out in the Argument above. The jurisdiction conferred upon the Supreme Court to review cases on certiorari was not merely to give the defeated party in the Circuit Court of Appeals another hearing. As stated by Mr. Chief Justice Taft in *Magnum Import Co.* v. *Coty,* 262 U. S. 159, 163, 164, 67 L. Ed. 922, 924, 43 S. Ct. 531 (1923), certiorari jurisdiction "is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." The strict criteria governing certiorari policy observed by the Court must be enforced to be respected. The issues which are argued by Petitioners are not deserv-

ing of consideration for review when the above criteria are applied.

Here, each of the lower courts have rendered decisions consistent with the overwhelming case law of Kentucky regarding Trustee's fee simple estate in the coal underlying the Sloans' land. As stated by the Petitioners in their Petition for Writ, "a respected bankruptcy judge" determined that the application for an extension of time to reject or assume which was timely filed by the Trustee was moot because of his finding that the Agreement was not executory within section 70(b) of the Bankruptcy Act. This ruling was upheld by the District Court.

In its determination that portions of the Agreement were executory, the Court of Appeals was correct in its assessment that the Trustee had not had an opportunity to assume or reject and should be given such opportunity. As such, the Sixth Circuit's decision does not demonstrate unacceptable conduct requiring this Court's supervision and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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APPENDIX

APPENDIX

APPLICATION TO EXTEND PERIOD WITHIN WHICH TRUSTEE SHALL ASSUME OR REJECT EXECUTORY CONTRACT—Filed November 3, 1972

To The Honorable Joe Lee, Referee In Bankruptcy:

The Application of Ruben G. Hicks, Trustee herein, respectfully represents:

1. Your Applicant is the Trustee of the above named estate, having been appointed October 6, 1972.

2. That the above named debtor has been adjudged a bankrupt.

3. That the above named bankrupt has by a writing dated the 22nd day of January, 1970, acquired an interest in real estate from Lola Gay Sloan, Tony Sloan, Lola Bettye Sloan, Ned T. Sloan, Jimmie Sloan, John Sloan, Margaret Sloan and Bruce R. Sloan. That the nature of the interest acquired by the above named bankrupt pursuant to the said agreement is the subject of a controversy presently before this Court. That your Trustee herein in the said controversy asserts and verily believes that the interest acquired in the aforesaid real estate is a fee simple title thereto.

4. That the bankrupt by a writing dated the 8th day of February, 1969, acquired an interest in other real estate from D. C. Byers, Flonnie Byers, David W. Byers, Sallie Ann Byers, Ruth Byers Graves, and Fred Graves. That this said real estate interest is the subject of a controversy now before this Court. That in the said controversy the trustee asserts and verily believes that the interest acquired in the said real estate was a fee simple title thereto.

5. That the Trustee believes that his claim to a fee simple title in the bankrupt in and to the aforesaid two tracts of real estate will be sustained by this Court. That,

however, if the said claim of the Trustee is not sustained, the aforementioned agreements could be interpreted as Executory Contracts between the said bankrupt and the above named persons.

6. That until the above controversy is determined by this Court, the Trustee will be unable to determine the necessity for acceptance or rejection of any such Executory Contracts, if any such contracts exist.

7. That it would be in the best interest of the creditors of the bankrupt estate to grant to the Trustee for the above reasons an extension of time to allow him to make such election as provided in Section 70B of the Acts of Congress relating to bankruptcy if the aforementioned written documents should be adjudged by this Court to be Executory Contracts.

WHEREFORE, your Applicant prays the Court for an Order extending the period within which he, as Trustee, shall assume or reject the Executory Contract relating to real estate herein, if any such writings are deemed to be such Executory Contracts, and that he be allowed such time after such finding of this Court to accept or reject any such contracts, and for such other relief as is just.

(s) William S. Howard
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